Petition

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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOHN RUPPEL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the prosecutor's increasing the charges against petitioner Ruppel after the assertion of his right to trial resulted in a hung jury violate petitioner's due process rights?

II. Did the district court's failure to charge the jury on the presumption of innocence and reasonable doubt before deliberations violate petitioner Ruppel's due process rights?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION REFERENCE	1
JURISDICTIONAL GROUNDS	2
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	5
ARGUMENT	8
I. The prosecutor's increasing the charges against petitioner following the exercise of his right to trial violated petitioner's due process rights.	8
II. The district court's refusal to charge the jury before deliberations on the presumption of innocence and reasonable doubt violated petitioner's due process rights.	17
III. Conclusion	23
APPENDIX	1a
CERTIFICATE OF SERVICE	53a

TABLE OF AUTHORITIES

CASES	PAGE
Blackledge v. Perry, 417 U.S. 21 (1974)	8, 9, 10, 11, 14, 17
Bordenkircher v. Hayes, 434 U.S. 357 (1978)	9, 11, 12, 13, 14, 17
Chaffin v. Stynchcombe, 412 U.S. 17 (1973)	11, 12, 13, 16
Colten v. Kentucky, 407 U.S. 104 (1972)	11, 12, 16
Edgington v. United States, 164 U.S. 361 (1896)	22
In re Winship, 397 U.S. 358 (1970)	18, 21, 23
Kentucky v. Whorton, 441 U.S. 786 (1979)	17, 23
North Carolina v. Pearce, 395 U.S. 711 (1969)	8, 9, 10, 11, 13, 14
Taylor v. Kentucky, 436 U.S. 478 (1978)	17,18, 23
United States v. Giglio, 405 U.S. 150 (1972)	6
United States v. Goodwin, 637 F.2d 250 (4th Cir.), *cert. granted*, 70 L.Ed.2d 613 (1981)	9, 14, 15, 16
United States v. Jackson, 390 U.S. 570 (1968)	10, 11, 13
United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976)	9
United States v. Timberlake, 559 F.2d 1375 (5th Cir. 1977)	23

CONSTITUTIONAL PROVISION

U.S. CONST. amend. V	2

STATUTES

18 U.S. C. § 1962(c)	2, 5
18 U.S.C. § 1962(d)	3, 5
18 U.S.C. § 1963(a)	3
18 U.S.C. § 3231	8
21 U.S.C. § 841(a)	3, 6
21 U.S.C. § 841(b)(1)(B)	3
21 U.S.C. § 846	4, 6
21 U.S.C. § 848	4, 5
28 U.S.C. § 1254(1)	2

APPENDIX

	PAGE
Opinion of United States Court of Appeals for the Fifth Circuit	1a
Order of United States Court of Appeals for the Fifth Circuit Denying Petition for Rehearing and Suggestion for Rehearing En Banc	23a
Order of United States Court of Appeals for the Fifth Circuit Denying Motion to Stay Mandate	25a
Order of Supreme Court of the United States Staying Mandate	27a
Indictment B-79-10-CR	28a
Indictment B-79-20-CR	43a
Pertinent Preliminary Instructions	50a
Pertinent Instructions Given Before Deliberations	51a
Summary of Evidence Against Petitioner	51a

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OPINION REFERENCE

John Ruppel petitions the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States to issue a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in *United States v. Ruppel*, No. 80-1962, 666 F.2d 261 (5th Cir. 1982).

JURISDICTIONAL GROUNDS

The judgment sought to be reviewed, cited above, is the January 5, 1982, affirmance by the United States Court of Appeals for the Fifth Circuit of petitioner's convictions in the United States District Court for the Eastern District of Texas in No. B-79-10-CR and No. B-79-20-CR.

Following the affirmance, petitioner Ruppel filed a petition to rehear and a suggestion to rehear en banc, both of which were denied March 2, 1982.

28 U.S.C. § 1254(1), which permits Supreme Court review "by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree," gives the Court jurisdiction to consider this petition.

CONSTITUTIONAL PROVISION AND STATUTES

Petitioner Ruppel asserts that certain acts of the prosecutor and the district court have violated the Due Process Clause of the Fifth Amendment to the United States Constitution, which Clause states: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Petitioner Ruppel was charged under the following United States statutes:

18 U.S.C. § 1962

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1963

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

21 U.S.C. § 841

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841

(b)(1)(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a

violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 848

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment ....

21 U.S.C. § 848

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if —

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter —

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

STATEMENT OF THE CASE

I.

Facts material to whether the prosecutor's increasing the charges against petitioner following the exercise of petitioner's right to trial violated his due process rights.

Petitioner Ruppel and twenty-three others were indicted in No. B-79-10-CR in the Eastern District of Texas on May 1, 1979. Petitioner Ruppel was charged with participating in a Racketeer Influenced and Corrupt Organizations Act conspiracy under 18 U.S.C. § 1962(d) (Count I), with substantively violating the RICO Act under § 1962(c) (Count III), and with engaging in a continuing criminal enterprise under 21 U.S.C. § 848 (Count XV). The allegations under each of these counts related to marihuana importation and distribution. A superseding indictment with the same charges was filed on July 10, 1979. Appendix at 28a.

Petitioner elected to contest B-79-10-CR, and on September 22, 1979, the court discharged the jury, which had not reached a verdict in the case. One month after the mistrial, on October 24, 1979, petitioner was charged in No. B-79-20-CR

with four violations of 21 U.S.C. § 841(a) and one violation of 21 U.S.C. § 846, each of which focused on the same conduct that was the basis of the first indictment, No. 10. Appendix at 43a. This new indictment increased petitioner's exposure by five felony counts, twenty-five years' imprisonment, $15,000, and at least ten years of special parole. Petitioner, contending that "[t]he particulars of the case lend themselves to the view that the defendant is being punished for escaping conviction by the exercise of his rights," moved the court to dismiss each of the conspiracy and four substantive counts of No. 20. Although the government made no attempt to explain the reason for the new charges, the court denied petitioner's motion.

The two indictments were consolidated and petitioner Ruppel was tried by himself on February 11 through 17, 1980, and found guilty on Counts III and XV of No. 10 and Counts II through V of No. 20. The government had earlier dismissed Count I of No. 10 and no verdict was returned on Count I of No. 20.

The court rejected petitioner's vindictiveness contention in his motion for new trial but, on April 16, 1980, did grant a new trial because the prosecutor had misrepresented his agreements with certain prosecution witnesses in violation of this Court's holding in *United States v. Giglio*, 405 U.S. 150 (1972).

Petitioner Ruppel then sought reconsideration of his motion to dismiss for vindictiveness and requested findings of fact on this issue. The government again refused to explain the new indictment, but petitioner's motion was once more denied. At trial, petitioner was acquitted of the charges in No. 10 and Count V of No. 20 but convicted on the conspiracy count and the other three substantive counts of No. 20.

On July 11, 1980, petitioner was sentenced to five years and $15,000 concurrently on Counts I, II, III, and IV except that

the fine on Count I was imposed consecutively. Petitioner Ruppel's motion for a new trial was denied on August 22, 1980.

II.

Facts material to whether the district court's refusal to charge the jury before deliberations on the presumption of innocence and reasonable doubt violated petitioner's due process rights.

After closing arguments in the third trial the court informed the jury that instead of repeating the "general definitions and instructions" on reasonable doubt, the presumption of innocence, and direct and circumstantial evidence, Appendix at 51a, he would ask the jurors to recall his instructions on these matters given eleven days earlier at the beginning of the trial. Appendix at 50a. Petitioner's objection to the court's refusal to charge the jury on these vital concepts was overruled. *United States v. Ruppel*, 666 F.2d 261, 274-75 (5th Cir. 1982).

III.

Disposition on appeal.

Contending, inter alia, that indictment No. 20 was vindictive and that the district court erred in failing to charge the jury on the presumption of innocence and reasonable doubt before deliberations, petitioner Ruppel sought review from the Court of Appeals for the Fifth Circuit. Petitioner's convictions, however, were affirmed by Thornberry, Reavley, Politz, Circuit Judges, on January 25, 1982.

Ruppel's petition to rehear and his suggestion for a rehearing en banc were denied by the Fifth Circuit on March 2,

1982. On March 10, 1982, his motion to the Fifth Circuit to stay the mandate pending disposition of his petition for a writ of certiorari was denied, but Justice White, as Circuit Justice for the Fifth Circuit, granted petitioner's application for the stay on March 19, 1982.

IV.

Basis for federal jurisdiction in the court of first instance.

The Federal District Court for the Eastern District of Texas had jurisdiction to hear the case under 18 U.S.C. § 3231.

ARGUMENT

I.

The prosecutor's increasing the charges against petitioner following the exercise of his right to trial violated petitioner's due process rights.

A. The Court of Appeals' holding that the Supreme Court has expressly limited protection against the realistic likelihood of vindictiveness to post-trial rights is incorrect.

On appeal, the Fifth Circuit held that the prosecutor's bringing the new indictment, No. 20, after petitioner had avoided conviction through the exercise of his Sixth Amendment right to a jury trial was not unconstitutionally vindictive. Specifically, the panel held that the prophylactic rule established in *North Carolina v. Pearce*, 395 U.S. 711 (1969), and *Blackledge v. Perry*, 417 U.S. 21 (1974), applies only to a court

or prosecutor's apparently retaliating against defendants who have successfully attacked their convictions:

> The exercise of 'some procedural right' by defendant during his prosecution — such as electing to stand trial before a jury — is by itself insufficient to place on the prosecutor the burden of demonstrating the absence of vindictiveness in his subsequent acts. The due process violation in cases such as *Pearce* and *Blackledge* does not arise from the possibility that a defendant might be deterred from exercising a procedural right. *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 667, 54 L.Ed. 2d 604 (1978). Rather it stems from the danger that the Government might retaliate 'against the accused for [some action] lawfully attacking his conviction.' *Id.*

United States v. Ruppel, *supra* at 266-67.

Since petitioner Ruppel asserted that he had likely been punished for exercising his Sixth Amendment right to trial, and not that he had likely been punished for attacking his conviction, the panel, though noting contrary authority in other circuits,[1] held that petitioner could not invoke the due process protection against vindictiveness announced in *Pearce* and *Blackledge*. As a result of this erroneous determination that the Supreme Court intended to protect only the exercise of post-trial rights, the panel refused to consider the circumstances

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[1] "We recognize that at least two United States Courts of Appeals have applied *Pearce* and *Blackledge* to prevent the Government from adding additional charges against a federal criminal defendant after he has elected a trial by jury prior to a conviction. See *United States v. Goodwin*, 637 F.2d 250 (4th Cir. 1981), *petition for cert. granted*, __ U.S. __, 102 S.Ct. __, 70 L.Ed.2d __, 50 U.S.L.W. 3447 (U.S. November 30, 1981) (No. 80-2195); *United States v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976)." *Ruppel*, *supra* at 267, n. 3.

surrounding the re-indictment or to analyze in any way the legitimacy of the prosecutor's interest in bringing the new indictment but instead rejected petitioner's contention because, according to the court, he had not proven actual vindictiveness.

Blackledge and *Pearce*, however, do not *limit* due process protection against likely vindictiveness to the exercise of a defendant's right to appeal his conviction but simply *extend* such protection, already given to constitutional rights, to a defendant's nonconstitutional right to attack his conviction. In *Pearce*, in which defendants, after successfully setting aside their convictions, received, upon their second convictions, sentences harsher than those originally imposed, the Court held that the rule announced in *United States v. Jackson*, 390 U.S. 570 (1968) — that "'penalizing those who choose to exercise' constitutional rights 'would be patently unconstitutional'" — clearly proscribed punishing the *Pearce* defendants, whose original convictions were "set aside because of a constitutional error." *North Carolina v. Pearce*, *supra*, at 724, *quoting United States v. Jackson*, *supra* at 581. In other words, the Court simply held that assertions of constitutional rights on appeal should be afforded no less protection against vindictiveness than the direct exercise of constitutional rights. Then, in dictum, the Court elected to confer due process protection upon a defendant's exercise of certain nonconstitutional rights:

> But even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law.

Pearce, *supra* at 724. The Court in *Pearce*, then, clearly did not intend to grant more protection to a defendant's right to attack a conviction than to his constitutional rights but simply

extended the holding of *United States v. Jackson*, *supra*, in which the Court ruled unconstitutional the deterrence of a defendant's exercise of his Sixth Amendment right to demand a jury trial, to a defendant's assertion of his nonconstitutional right to set aside convictions.

In *Blackledge v. Perry*, *supra*, the Court held that a prosecutor's desire to hold down expenditures in obtaining final convictions and his distaste for the possibility that a defendant may go free, the same prosecutorial considerations implicated in petitioner Ruppel's case, coupled with an increase in the charges against a defendant after a defendant's assertion of a right, gave rise to an appearance of prosecutorial vindictiveness. Although the increased penalty upon retrial in *Blackledge* did follow an attack upon a conviction, no statement in the opinion indicates that the Court intended to deviate from *Jackson*, *supra*, and *Pearce*, *supra*, and anomalously confer greater protection upon the exercise of nonconstitutional rights than upon the exercise of constitutional ones.

The panel's interpretation of *Pearce* and *Blackledge* is apparently based upon dictum from *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), which the panel acknowledged in its opinion:

> The Court has emphasized that the due process violation in cases such as Pearce and Blackledge lies not in the possibility that a defendant might be deterred from the exercise of a legal right, see Colten v. Kentucky and Chaffin v. Stynchcombe, but rather in the danger that the state might be retaliating against the accused for lawfully attacking his conviction.

Bordenkircher, *supra* at 363 (full citations omitted). The Supreme Court here, however, was not distinguishing between prosecutorial retaliation against defendants who have attacked convictions and retaliation against defendants who have exercised other rights. Rather, as the cases cited in this passage make plain, the Court was simply noting that not

every exercise of a defendant's right creating the possibility of increased punishment invokes due process protection but that due process simply ensures that a defendant's exercise of his rights will not be deterred by the fear of retaliation. In *Colten*, 407 U.S. 104 (1972), and *Chaffin*, 412 U.S. 17 (1973), the defendants, after successfully attacking their original convictions, eventually received sentences harsher than those initially given. The Court simply held that since neither the sentencing court in *Colten* nor the sentencing jury in *Chaffin* had any connection with the defendants' original sentences, the possibility of vindictiveness was not present. *Colten, supra* at 116-18; *Chaffin, supra* at 24-28. Unlike both the judge in *Colten* and the jury in *Chaffin*, whose disinterest was patent, prosecutor Baugh, who reindicted petitioner Ruppel after his attempts to convict petitioner were frustrated at the first trial, did not clearly lack retaliatory motivation.

In fact, the principle that a defendant's assertion of his right to trial lies within the canopy of protection against vindictiveness is emphasized in *Bordenkircher*, in which the Court held that defendant's rights were not violated by the prosecutor's increasing sentence following defendant's refusal to plead guilty *only because* the defendant had been fully apprised that the prosecutor would add new charges unless defendant capitulated:

> It may be helpful to clarify at the outset the nature of the issue in this case. While the prosecutor did not actually obtain a recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of the plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had

> ended with the defendant's insistence on pleading not guilty.
>
> * * *
>
> We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.

Bordenkircher, supra at 360, 365.

In reaching this holding, the Supreme Court, citing, inter alia, *United States v. Jackson, supra*, in which the court forbade legislatively punishing a defendant for choosing to go to trial rather than plead guilty, stated:

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, North Carolina v. Pearce, supra, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' Chaffin v. Stynchcombe, supra. See United States v. Jackson. But in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.

Bordenkircher v. Hayes, supra at 363 (complete citations omitted). Therefore, had not the defendant in *Bordenkircher* been "free to accept or reject the prosecution's offer," the increased punishment following defendant's decision "[to do] what the law plainly allows him to do"—proceed to trial—would have violated his due process rights. Since prosecutor Baugh did not inform petitioner Ruppel of the repercussions

of his decision to contest the charges in No. 10, his reindicting petitioner compels due process scrutiny.

Pearce, Blackledge and *Bordenkircher* emphasize that constitutional rights, as well as post-trial nonconstitutional ones, must be protected from the likelihood of vindictiveness. Therefore, the Fifth Circuit's failure to inquire into whether the circumstances surrounding the increased charges created "'an apprehension of retaliatory motivation,'" *Blackledge v. Perry, supra* at 28, *quoting North Carolina v. Pearce, supra* at 725, precluded vindication of petitioner's due process rights.

B. The circumstances surrounding the prosecutor's bringing No. 20 present a realistic likelihood of vindictiveness.

In *United States v. Goodwin*, 637 F.2d 250, 253 (4th Cir. 1981), *petition for cert. granted*, 70 L.Ed.2d 613 (1981), the Court of Appeals, relying upon *Blackledge v. Perry, supra*, held that under the circumstances of the case the government's bringing felony charges against defendant after his refusal to plead guilty to a misdemeanor "presented 'a realistic likelihood of "vindictiveness"'" and reversed his conviction. Even though the prosecutor who obtained the felony indictment was not the same prosecutor who had conducted the plea negotiations and, at the time of the new indictment, had listed in an affidavit his reasons for bringing the new charge, the Court determined that the new indictment was likely vindictive because it arose from the same conduct on which the earlier indictment was based and the information ostensibly motivating the new indictment was available before defendant's refusal to make a deal.

The circumstances in *Ruppel* even more strongly compel a finding of a realistic likelihood of vindictiveness. First, as in

Goodwin, the new indictment in *Ruppel* was based upon the same conduct that gave rise to the earlier indictment:

The RICO conspiracy count of the first indictment, No. 10, charged petitioner with purchasing the Monkey, purchasing the Jubilee, discussing marihuana smuggling in an apartment in Houston, discussing marihuana smuggling in Dallas, paying Butler, Holland, and Holland's wife $20,000 in Knoxville, Tennessee, for a downpayment on the Agnes Pauline, and discussing the posting of bond with James Holland after the Agnes Pauline load was confiscated. The substantive RICO count charged petitioner with smuggling into the United States one load of marihuana aboard the Monkey, two loads of marihuana aboard the Jubilee, and one load of marihuana aboard the Agnes Pauline. The substantive count also charged petitioner with possessing, intending to distribute, and distributing the marihuana smuggled aboard the Monkey and the Jubilee. The continuing criminal enterprise count incorporated the substantive and conspiracy RICO counts.

The conspiracy count of the second indictment, No. 20, charged that petitioner purchased the shrimp boat Monkey, purchased the shrimp boat Jubilee, discussed the smuggling of marihuana while in Houston, Texas, discussed the smuggling of marihuana while in Dallas, Texas, discussed the purchase of the Agnes Pauline in Gatlinburg, Tennessee, and spoke to a co-conspirator following the seizure of the Agnes Pauline. The four substantive counts of indictment No. 20 charged petitioner with possessing with intent to distribute the load of marihuana smuggled aboard the Monkey (Count II), the two loads smuggled aboard the Jubilee (Counts III and IV), and the load smuggled aboard the Agnes Pauline (Count V).

Also, like the prosecutor in *Goodwin* and unlike the prosecutor in *Bordenkircher,* prosecutor Baugh never informed petitioner of his intention to increase the charges . The new in-

dictment, therefore, advanced no plea bargaining interest and instilled in petitioner the apprehension of punishment the Due Process Clause seeks to prevent. See *Bordenkircher v. Hayes, supra; Goodwin, supra* at 253-54.

Unlike the prosecutor in *Goodwin*, however, prosecutor Baugh never set forth, through a response to petitioner's vindictiveness motions or in any other way, any justification for the new indictment. Moreover, the increased charges in *Ruppel* did not merely follow a pre-trial announcement of petitioner's intention to exercise his right to trial,[2] as in *Goodwin*, but the actual assertion of this constitutional right, an assertion that thwarted the prosecutor's attempt to convict petitioner. The prosecutor's inevitable frustration over his failure to convict, especially in light of his refusal to indicate any reason for the new indictment, strongly suggests a vindictive response. Furthermore, the investigation into petitioner's alleged conduct had certainly concluded sometime before the end of the first trial; therefore, the possibility that any newly discovered evidence justified the new indictment is even more remote than in *Goodwin,* in which the prosecutor brought the new charges before defendant's trial. And as scrutiny of No. 20's allegations reveal, no new facts were actually alleged in this later indictment.

Finally, this case, unlike *Goodwin*, bears no similarity to *Chaffin, supra,* and *Colten, supra*, in which vindictiveness claims were dismissed upon the Supreme Court's determination that

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[2] Another circumstance perhaps indicating likely vindictiveness is the prosecutor's offer of a reduced sentence to petitioner. *See Goodwin, supra.* Although petitioner was prepared to present evidence of such offers, the district court refused to make findings of fact on the vindictiveness issue, and this evidence never became part of the record. If the Supreme Court believes that such a showing is required to support petitioner's claim of likely vindictiveness, petitioner respectfully asserts that he should be permitted to present this proof.

the sentencing entities, because of their obvious ignorance of the assertions of defendants' rights, plainly lacked vindictive motivation. Prosecutor Baugh, who brought the increased charges against petitioner, was in charge of the prosecution when petitioner exercised his right to trial and stymied the government's attempts to convict. Consequently, in *Ruppel* a retaliatory motive is not absent.

Because of its erroneous interpretation of *Blackledge v. Perry, supra*, and *Bordenkircher v. Hayes, supra*, the Fifth Circuit refused to consider whether a reasonable likelihood of vindictiveness could be inferred from the circumstances surrounding prosecutor Baugh's bringing indictment No. 20.[3] Since those surrounding circumstances clearly require a finding of likely vindictiveness, the Court should grant this petition.

II.

The district court's refusal to charge the jury before deliberations on the presumption of innocence and reasonable doubt violated petitioner's due process rights.

Petitioner Ruppel asserted on appeal that the district court's failure to charge on the presumption of innocence violated his due process rights under *Taylor v. Kentucky*, 436 U.S. 478 (1978), and *Kentucky v. Whorton*, 441 U.S. 786

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[3] The Court of Appeals did note that "a trial followed by a mistrial due to a hung jury presents different considerations than a conviction followed by a reversal. The mistrial follows as of course from the jury's inability to agree upon a verdict. Unlike an attack upon a conviction, a mistrial resulting from a hung jury does not result from any action taken by a defendant." *Ruppel, supra* at 267. This conclusion is illogical: a mistrial because of a hung jury, of course, is the direct result of the exercise of a defendant's right to trial. And as noted, such a result could trigger a vindictive response and, in this case, certainly did.

(1979). The panel, omitting any discussion of *Taylor*, held that petitioner's right to due process had not been abridged. *Ruppel, supra* at 274-75. Petitioner's contention that *In re Winship*, 397 U.S. 358 (1970), required an explanation of the prosecutor's burden of proof before deliberations was not addressed.

In *Taylor*, the Supreme Court recognized that the presumption of innocence, in addition to informing the jury that the prosecution has the burden of proof, conveys "a special and additional caution" to the jury to consider "*nothing but the evidence*, i.e., no surmises based on the present situation of the accused." *Id.* at 485 (emphasis in original). Accordingly, the Court held that although the trial court's failure to instruct on the presumption was not a *per se* violation of defendant's due process rights, when circumstances, particularly the court's instructions and the prosecutor's argument, give rise to a risk that defendant's guilt will not be determined "solely on the basis of the evidence introduced at trial," but will be ascertained in part on "grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial," the trial court must instruct the jury on the presumption of innocence. *Id.* at 485. This holding was reiterated in *Whorton*, in which the Court simply remanded a case to the Supreme Court of Kentucky with instructions to apply *Taylor's* rule.

An examination of the interaction between the district court's instructions and statements made by prosecutor Baugh clearly reveals a substantial possibility that the jury relied upon the indictment as evidence against petitioner Ruppel. Although both Indictments No. 10 and No. 20 were read by prosecutor Baugh to the jury before the opening statements, the court never informed the jury that the indictments were not to be considered by them in reaching a verdict. On the contrary, the court's statements indicated that

the indictments *were* evidence. Shortly after the prosecutor read the indictments to the jury, the court informed the jury that

> [a]nything you have seen or have heard or may see or may hear outside this Courtroom is not evidence. The evidence will come from the witness stand and *any documents which may be admitted into evidence.* You are to consider only the evidence in this case, but in considering the evidence you're not limited to the bald statements of the witnesses. *You are not limited solely to what you see and hear a witness say or testify from the stand.*

Since the indictments had just been read to the jury without a caveat that they were not evidence, the jury could have reasonably inferred that the indictments were "documents which may be admitted into evidence." The fact that defense counsel continually objected to, and moved for a mistrial because of, various errors committed by the prosecutor in reading the indictments heightened the possibility that the jurors wrongfully considered their contents more than mere accusations and in fact relied upon them as evidence.

The jurors' erroneous impression was solidified by the court's admonition to them following defense counsel's above-mentioned motion for mistrial:

> THE COURT: The motion is noted.
>
> Ladies and gentlemen, the point brought to the Court's attention was this indictment as originally received included a number of Defendants. It's rather lengthy. The particular Count the Government started to read includes one, as the Court understands it, that has been previously dismissed by the Government; is that correct?
>
> MR. BAUGH: Yes, sir.

> THE COURT: You will not consider the statements [in the indictment] read to you *on that Count*, because that is no longer before the Court. It has been dismissed by the Government. With that instruction the motion for mistrial is overruled.

(emphasis added). This direction clearly imparted that the jury *should* "consider the statements read to [them]" from the indictment as evidence on the other counts.

The prosecutor's closing argument further perpetuated this harmful notion. After several references to "transactions covered in the indictment," prosecutor Baugh, before being interrupted by a juror, stated: "The first one [transaction] that is covered in the *indictment from which we had evidence of*—" (emphasis added). This announcement informed the jurors once more that evidence *did* come from the indictments and greatly increased the need for the court's giving a presumption of innocence instruction at the close of the arguments.

Moreover, because the instruction on reasonable doubt was not given before deliberations, an explanation of the presumption of innocence was required to apprise the jurors of the prosecutor's burden of proof, especially since the court's charge on the presumption of innocence at the beginning of trial instructed the jurors that this presumption disappeared *during the presentation of proof* when the government met its burden:

> THE COURT: This presumption of innocence remains with the Defendant *all through the case* until it is overborne by proof that satisfies you beyond a reasonable doubt that the presumption of innocence no longer remains with the Defendant.

Moments later in his preliminary instructions, the court made plain that the "case" did not include the deliberations but that the deliberations were a separate stage of the trial following the "case":

> THE COURT: I know I've mentioned this before, but there's a very good reason why you should not even discuss it with one another, because that amounts to deliberating the case. There will come a time for you to begin your deliberations. When that time comes, the Court will tell you that the time has come now for you to deliberate this case.

Because of this flawed reasonable doubt instruction and the court's failure to charge the jury on the government's burden of proof and the presumption of innocence before deliberations, the jurors probably concluded that once the government's case excluded a reasonable doubt about petitioner's guilt, the burden shifted to petitioner to establish his innocence, not just a reasonable doubt about his guilt. The court's failure to correct this impression by explaining these concepts at the close of the case obviously violated petitioner's due process rights. *In re Winship*, 397 U.S. 358 (1970).

Other instructions by the court exacerbated the harm created by the court's impermissible instruction on reasonable doubt and its failure to rectify the error by explaining the presumption of innocence or the prosecutor's burden of proof before deliberations. First, the court, refusing to give the character instruction approved by the Fifth Circuit District Judges Association and requested by the petitioner, charged the jury that even character evidence that "may indicate to you that it's *improbable* that a person of such good character would commit the crimes charged. . . . does not preclude the Defendant from being so involved." This instruction not only subjected character evidence to a preponderance-of-the-evidence standard rather than one of reasonable doubt, but informed the jury that even if petitioner's character evidence met this unconstitutional standard, it still would not be sufficient to acquit. Such an instruction obviously conflicts with the rule that character evidence giving rise to a reasonable

doubt about a defendant's guilt requires acquittal. *Edgington v. United States*, 164 U.S. 361 (1896).

Second, petitioner requested that the court instruct the jury that "if certain evidence is deemed by you to be susceptible to two equally reasonable interpretations, one pointing to innocence and another pointing to guilt, it is your duty to interpret that evidence as indicative of innocence." In its instructions at the trial's outset, the court charged the jury that

> if there are two reasonable theories equally supported by the evidence; one consistent with guilt, the other consistent with innocence; you must adopt the theory consistent with innocence and acquit the Defendant, *because he could not be said to be guilty beyond a reasonable doubt.*

Petitioner Ruppel objected that the instruction, given with the reasonable doubt language, equated the beyond-a-reasonable-doubt burden of proof with the preponderance-of-the-evidence standard: "[The instruction as given] conveys the concept that if the Defendant's theory is not equally supported by the evidence, then the jury could convict the Defendant . . . ." The objection was overruled and the erroneous impression never corrected.

In determining whether the court's failure to charge on the presumption of innocence before deliberations was constitutional error, the Court of Appeals also failed to consider the district court's misleading placement of petitioner's theory-of-defense instruction *after* reading the jury the essential elements of the continuing criminal enterprise violation and summarizing the government's position on the racketeering count and long *before* reading the instructions on the conspiracy and four possession counts.[4] This placement logically indicated to the

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[4] "[A]ll the instructions to the jury" are to be considered in determining whether a failure to charge on the presumption of innocence violates due process rights. *Kentucky v. Whorton*, *supra* at 789.

jury that this theory was intended only as a defense to the continuing criminal enterprise and racketeering counts. This notion was buttressed by the court's reading co-defendant Foster's theory-of-defense instruction after charging the jury on *all* the counts against him and its reading the character instruction applicable to defendant Ruppel after charging the jury on *all* the counts against him. Petitioner Ruppel was convicted on four of the five counts on which the jury was instructed *after* the giving of his defense theory and acquitted on the two counts discussed *before* the theory-of-defense instruction. The effect of the district court's unfortunate timing deprived petitioner of his right to inform the jury of his defense applicable to the counts on which he was convicted. *E.g., United States v. Timberlake*, 559 F.2d 1375 (5th Cir. 1977).

The government's proof, resting upon statements by alleged co-conspirators whose testimony was induced by promises of leniency, was weak and contradicted by the testimony of a convicted co-conspirator who had not made a deal with the government.[5] Appendix at 51a. The district court's cavalier treatment of the presumption of innocence and reasonable doubt must have caused even those jurors who remembered these instructions given eleven days before deliberations to regard these essential concepts as surplusage and deprived petitioner both of his right to be judged only upon the evidence and his right to require the prosecutor to exclude from each juror's mind a reasonable doubt about his guilt. The court's failure to instruct the jury on reasonable doubt and the presumption of innocence before deliberations, therefore, clearly was constitutional error under *Taylor v. Kentucky, supra, Kentucky v. Whorton, supra*, and *In re Winship, supra*.

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[5] The absence of "overwhelming evidence" against petitioner Ruppel is yet another "circumstance" bolstering petitioner's contention that the district court's failure to charge on the presumption of innocence was constitutional error. *Kentucky v. Whorton, supra* at 789.

III.

Conclusion.

For the reasons stated above, petitioner Ruppel humbly requests this Court to issue a writ of certiorari.

Respectfully submitted,

ROBERT W. RITCHIE

RICHARD A. HAMRA II
Attorneys for Petitioner

Appendix

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES of America,
Plaintiff-Appellee,

v.

John RUPPEL, Defendant-Appellant.

No. 80-1962.

United States Court of Appeals,
Fifth Circuit.*
Unit A

Jan. 25, 1982.

Joseph M. Tipton, Robert W. Ritchie, Knoxville, Tenn., for defendant-appellant.

David P. Baugh, Asst. U.S. Atty., Beaumont, Tex., William C. Bryson, Deborah Watson, Attys., Dept. of Justice, Washington, D.C., for the U.S.

Appeal from the United States District Court for the Eastern District of Texas.

Before THORNBERRY, REAVLEY and POLITZ, Circuit Judges.

REAVLEY, Circuit Judge:

On May 1, 1979, the appellant, John Ruppel, was named along with twenty-three others[1] in a multi-count indictment returned in the United States District Court for the Eastern District of Texas. The indictment outlined a scheme in which

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* Former Fifth Circuit case, Section 9(1) of Public Law 96—452—October 14, 1980.

Ruppel and his coconspirators imported approximately 147,000 pounds of marijuana from Colombia into Texas and arranged for its distribution throughout the United States. The conspiracy involved the purchase of four shrimping vessels: Monkey, Jubilee, Bayou Blues, and Agnes Pauline. Using these vessels, the conspirators arranged for five different shipments of marijuana to be brought from Colombia into Texas where it was unloaded into trucks and transported to various points for distribution.

The indictment charged Ruppel with conducting the affairs of an enterprise through a pattern of racketeering activity, *see* 18 U.S.C. § 1962(c), conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity, *see* 18 U.S.C. § 1962(d), and engaging in a continuing criminal enterprise, *see* 21 U.S.C. § 848. His first trial ended when the jury was unable to reach a unanimous verdict on any of the three counts lodged against him.[2]

Subsequently, the grand jury named the appellant in a second indictment and charged him with conspiracy to violate the drug laws, *see* 21 U.S.C. § 846, and with four counts of

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[1] For ease of identification throughout this opinion, we have referred to those indicted along with the appellant as "coconspirators" or "conspirators" even though all were not convicted of conspiracy and some had all charges against them dismissed. *See* note 2 *infra*.

[2] Of the 24 persons named in the indictment, several decided to testify for the government in exchange for a favorable plea bargain. Five of these conspirators eventually succeeded in persuading the Government to dismiss all counts against them. Their story is told in *United States v. Butler*, 486 F.Supp. 1285 (E.D.Tex. 1980), *rev'd sub nom. United States v. Hamm*, 659 F.2d 624 (5th Cir. 1981) (en banc). Of those who stood trial alongside the appellant, most were convicted. For their appeal to this court see *United States v. Hawkins*, 658 F.2d 279 (5th Cir. 1981).

possession of marijuana with intent to distribute, *see* 21 U.S.C. § 841. Both indictments were consolidated for trial and the Government dismissed the count charging Ruppel with conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity. The jury in the second trial was unable to reach a verdict on the count charging the appellant with conspiracy to violate the drug laws, but found him guilty as charged in the remaining counts in the indictments. After sentencing, however, the district judge, relying on *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), granted Ruppel a new trial because the Government had not disclosed at the second trial the terms of its plea agreements with several witnesses.

Ruppel was retried along with a recently surfaced co-conspirator, Charles Elbert "Muscles" Foster. The jury in this, the third trial, found the appellant guilty of conspiracy to violate the drug laws and of three of the four counts of possession of marijuana with intent to distribute — all counts from the second indictment.

In his appeal to this court, Ruppel raises several issues:

1. Whether the second indictment against him should have been dismissed for prosecutorial vindictiveness?

2. Whether the Government misused the grand jury to obtain additional evidence against him after he already had been indicted?

3. Whether his trial should have been severed from the trial of codefendant Foster?

4. Whether conconspirator Hamm's testimony, relating to appellant's knowledge of the purchase of the Monkey, was admissible in evidence?

5. Whether coconspirator Butler's testimony, that codefendant Foster said that he [Foster] and Ruppel would split the profits from the next shipment of marijuana, was admissible in evidence?

6. Whether tape recordings of several telephone calls made by coconspirator Butler were admissible in evidence?

7. Whether the district judge correctly instructed the jury on character evidence?

8. Whether the district judge, already having instructed the jury on the presumption of innocence at the outset of the trial, was required to repeat this instruction in his charge to the jury?

We consider these issues *seriatim* and affirm.

1. Prosecutorial Vindictiveness

The appellant's claim of prosecutorial vindictiveness is predicated on two decisions of the Supreme Court, *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), and *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), which he claims establish that

> when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive motive.

United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976) (footnote omitted). Ruppel contends that his decision to plead not guilty and stand trial on the counts contained in the initial indictment was the exercise of a procedural right — the right to a trial by jury — and that his due process rights were violated when the Government indicted him for additional crimes arising out of the same transactions upon which the first indictment was based. We disagree with the appellant's reading of *Pearce* and *Blackledge*.

The exercise of "some procedural right" by a defendant during his prosecution — such as electing to stand trial before a jury — is by itself insufficient to place on the prosecutor the

burden of demonstrating the absence of vindictiveness in his subsequent acts. The due process violation in cases such as *Pearce* and *Blackledge* does not arise from the possibility that a defendant might be deterred from exercising a procedural right. *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 667, 54 L.Ed.2d 604 (1978). Rather, it stems from the danger that the Government might retaliate "against the accused for [some action] lawfully attacking his conviction." *Id. (Pearce* and *Blackledge* do not apply when a prosecutor carries out a threat to reindict on more serious charges if the accused does not plead guilty to the offense with which he was originally charged); *see, e.g., Jackson v. Walker*, 585 F.2d 139 (5th Cir. 1978) *(Pearce* and *Blackledge* apply when a defendant is successful on appeal in overturning his state criminal conviction); *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977) *(Pearce* and *Blackledge* apply when a state criminal defendant succeeds in setting aside his conviction through federal habeas corpus), *cert denied*, 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 (1978); *Miracle v. Estelle*, 592 F.2d 1269 (5th Cir. 1979) *(Pearce* and *Blackledge* apply when trial court grants a defendant's motion for a new trial subsequent to a conviction). As explained by Dean Vorenberg,

> While the doctrine . . . purports to prohibit retaliatory prosecution generally, it appears to be applied only where prosecutors have retaliated against specially protected actions by defendants, such as the exercise of first amendment rights or the right to appeal a conviction. Allowing the punishment of a defendant to be increased because he wishes to exercise his right to go to trial is considered to be pragmatically justified by the state's interest in efficient criminal administration, notwithstanding the burden placed on the exercise of the sixth amendment right to trial by jury.

Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L.Rev. 1521, 1541-42 (1981) (footnotes omitted).

We reject the appellant's claim of prosecutorial vindictiveness. Ruppel's first trial ended in a mistrial because the jury was unable to reach a verdict. Not only was there no conviction to attack, but a trial followed by a mistrial due to a hung jury presents different considerations than a conviction followed by a reversal. The mistrial follows as of course from the jury's inability to agree upon a verdict. Unlike an attack upon a conviction, a mistrial resulting from a hung jury does not result from any action taken by a defendant.

Absent evidence of actual retaliation, mere reindictment after a mistrial due to a hung jury is insufficient to demonstrate the realistic likelihood of prosecutorial vindictiveness to which *Pearce* and *Blackledge* apply.[3] As Ruppel's claim of prosecutorial vindictiveness is based solely on a reindictment following a hung jury, it is without merit.

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[3] We recognize that at least two United States courts of appeals have applied *Pearce* and *Blackledge* to prevent the Government from adding additional charges against a federal criminal defendant after he has elected a trial by jury prior to a conviction. *See United States v. Goodwin*, 637 F.2d 250 (4th Cir. 1981), *petition for cert. granted*, __ U.S. __, 102 S.Ct. __, 70 L.Ed.2d __ (U.S. Nov. 30, 1981) (No. 80-2195); *United States v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976).

We believe, however, that the rationale of the Ninth Circuit in *Ruesga-Martinez* has been substantially undermined by the Supreme Court's decision in *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). We also are of the opinion that the decision of the Fourth Circuit in *Goodwin* may not be squared with the Supreme Court's teachings in *Bordenkircher*. Accordingly, we expressly decline to follow either of these decisions.

2. Grand Jury Misuse

We likewise find no merit in the appellant's claim that the Government misused the grand jury when it called convicted coconspirator Jamie Holland before the grand jury on April 3 and 4, 1980 and questioned him about the marijuana smuggling operation.

The law is well settled in this circuit that while the Government may not use the grand jury in place of discovery for the purpose of preparing a pending indictment for trial, it may continue with an investigation. *E.g., United States v. Beasley*, 550 F.2d 261, 266 (5th Cir.), *cert. denied*, 434 U.S. 863, 938, 98 S.Ct. 195, 427, 54 L.Ed.2d 138, 297 (1977); *Beverly v. United States*, 468 F.2d 732, 743 (5th Cir. 1972). Ruppel contends that the Government's interrogation of Holland before the grand jury was not in furtherance of the Government's ongoing investigation into marijuana smuggling, but "dealt ... with matters exclusively relating to pending charges."

We have reviewed Holland's grand jury testimony and conclude that the Government did not misuse the grand jury when it summoned Holland for questioning. Even a cursory examination of the transcript of the proceedings shows the Government was continuing with its investigation into marijuana smuggling from Colombia into the United States. Questions were asked of Holland about individuals known only by nickname and not yet named in any indictment. *Cf. Beverly*, 468 F.2d at 743 ("A proper purpose for subpoenaing appellants would be to inquire of them as to the surrounding circumstances with a view to discovery of the identity of the alleged 'unknown persons' [mentioned in the indictment]."). To be sure, the Government may have benefitted incidentally from Holland's grand jury testimony as he reviewed his participation in the conspiracy. But, in light of the presumption that the grand jury and the prosecutor have properly performed their duties, *Beverly*, 468 F.2d at 743, we cannot say that this use of the grand jury in furtherance of a continuing criminal in-

vestigation was improper. Moreover, as Holland was brought before the grand jury subsequent to Ruppel's conviction at his second trial, and before the judge had granted a new trial, we cannot surmise that the Government was using the grand jury to prepare for a then unexpected third trial.[4]

3. Severance

Ruppel contends that the district judge should have severed his trial from that of codefendant Charles Foster. He claims that had his severance motion been granted and the Government tried Foster initially, Foster would have been available to testify that the participants in the marijuana smuggling operation intentionally withheld from him information regarding criminal activities — specifically, any information that the Monkey was being used criminally.

We often have emphasized that a motion for severance is directed to the sound discretion of the district judge, *see, e.g.*, *United States v. Hawkins*, 661 F.2d 436, 457 (5th Cir. 1981); *United States v. Horton*, 646 F.2d 181, 187 (5th Cir. 1981), and that we are reluctant to second guess a trial judge's refusal to grant a severance, *see, e.g.*, *Hawkins*, 661 F.2d at 457; *United States v. Marino*, 617 F.2d 76, 83 (5th Cir.), *cert. denied.*, 449 U.S. 1015, 101 S.Ct. 575, 66 L.Ed.2d 474 (1980). To qualify for a severance in order to obtain the testimony of a codefendant, a criminal defendant must show: "(1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the co-defendant will in fact testify if the cases are severed." *United States v. Butler*, 611 F.2d 1066, 1071 (5th Cir.), *cert. denied*, 449 U.S. 830, 101

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[4] On March 14, 1980, the district judge entered a judgment convicting the appellant after his second trial. Holland was called before the grand jury on April 3 and 4, 1980. The appellant's motion for a new trial was not granted until April 18, 1980 — nearly 2 weeks after Holland appeared before the grand jury.

S.Ct. 97, 66 L.Ed.2d 35 (1980). The district judge should grant a severance only if the defendant also demonstrates that he is unable to obtain a fair trial without the severance and any compelling prejudice that results cannot be alleviated at trial. *United States v. Horton*, 646 F.2d 181, 186 (5th Cir. 1981); *United States v. Crawford*, 581 F.2d 489, 491 (5th Cir. 1978).

There was no indication that Foster would "in fact testify if the cases [were] severed." Indeed, in support of his motion Ruppel argued that if a severance were granted Foster "would more likely testify" at his subsequent trial. We have, however, recently rejected this precise assumption as establishing grounds for a severance. *See Unites States v. Grapp*, 653 F.2d 189, 193 (5th Cir. 1981).

Moreover, the appellant did not have a bona fide need for codefendant Foster's testimony. Ruppel anticipated that Foster would relate how the other participants in the smuggling operation did not permit him to know that their venture was illegal. Similar testimony, however, was presented by at least one coconspirator, Jamie Holland. Another coconspirator, Martin Sneed, indicated that he was unaware Ruppel even was involved in the operation. Thus, Foster's testimony would have served "merely [to] duplicate[ ] other evidence" and, accordingly, did not justify a severence. *See United States v. Metz*, 608 F.2d 147, 156 (5th Cir. 1979), *cert. denied*, 449 U.S. 821, 101 S.Ct. 80, 66 L.Ed.2d 24 (1980).

4. Hamm's Testimony

As part of the Government's case-in-chief, Robert Hamm, another coconspirator in the marijuana smuggling operation, related on direct examination Ruppel's involvement in the purchase of the shrimping vessel Monkey. Ruppel's counsel, Robert Ritchie, followed on cross-examination by taking Hamm through a series of questions designed to show the jury that while the appellant was involved in the purchase of the

Monkey, Ruppel's involvement was, as far as Hamm knew, intended by Ruppel to be a ligitimate business venture. The cross-examination culminated:

RITCHIE: And you did not know that John Ruppel was in the business — you didn't know, did you, when he came down to Aransas Pass — you didn't know whether this man knew anything about it or not, did you?

HAMM: No, sir.

RITCHIE: You didn't know whether or not he was knowledgeable about the marijuana business at all, did you?

HAMM: No, sir.

RITCHIE: And you didn't know it to this day, do you, Mr. Hamm?

HAMM: No, sir.

On redirect the Government sought to dispel the impression from Hamm that Ruppel was unaware of the purpose to which the shrimping vessel would be put. David Baugh, the prosecutor, asked:

BAUGH: At anytime during the meeting did you think that Mr. Ruppel didn't know what you were doing?

HAMM: No, sir.

The appellant contends that this testimony is inadmissible.

The starting point of our analysis of the admissibility of this testimony is that the ultimate decision on admissibility rests in the hands of the trial judge, whose exercise of discretion will be upset only for clear abuse. *Scheib v. Williams-McWilliams Co.*, 628 F.2d 509, 511 (5th Cir. 1980). The district judge admitted Hamm's testimony because Hamm's thoughts on Ruppel's involvement in the purchase of the Monkey and its use as a vessel to transport marijuana from Colombia had been "opened up" by Ruppel's counsel on cross-examination.

An inquiry about facts known by the witness' own observation does not open the door to cross-inquiry about conclusions

gleaned from the witness' appraisal of circumstances. It is for the jury to draw conclusions from those facts known to the witness and accepted as true by the jury. This is particularly so of that conclusion on intention or state of mind of the appellant.

Defense counsel asked the prosecution witness, Hamm, if the conversation with the appellant included any reference to marijuana. He was entitled to ask, with impunity, if Hamm had personal knowledge of what facts were known to Ruppel. Hamm understood that to be what he was being asked, and his response was therefore in the negative.

On the other hand, counsel may not mislead the jury or convey an erroneous impression without opening the avenue for cross-interrogation for purposes of clarification. *See United States v. Fairchild*, 505 F.2d 1378, 1383 (5th Cir. 1975); *United States v. Paquet*, 484 F.2d 208, 211 (5th Cir. 1973). Whether intentional or not, the three questions put to Hamm conveyed the impression that this actor in the conspiracy did not think at any time that Ruppel knew the vessels were handling marijuana instead of shrimp. The prosecution clarified the point by eliciting a mere "No, sir" in response to the inquiry whether Hamm was saying that he thought at the time of the meeting that Ruppel did not know "what you were doing."

The admission of opinion testimony about a defendant's state of mind is highly prejudicial and must be avoided. If, on voir dire either in or out of the hearing of the jury, the witness, Hamm, had testified that his impression came solely from hearsay rather than from his observation of the defendant, his opinion or thought on the subject would have been subject to motion to strike. Nevertheless, under the circumstances, we find no error in admitting the answer to the prosecutor's question.

5. Butler's Testimony

During the trial, Butler testified extensively about an August 1978 meeting held at the DFW Airport's Marina Hotel that included Ruppel, Holland, Foster, and himself. It was at this meeting that the conspirators first laid their plans for the shipment of marijuana on the Agnes Pauline. Butler testified that as part of his increased involvement in the marijuana smuggling operation he was to assist in the purchase and outfitting of another boat. The participants at the meeting discussed the purchase of a boat capable of hauling marijuana. Butler recounted that because some concern had developed that several conspirators under Foster's supervision had not been paid for their assistance in prior smuggling operations, the conversation turned to who was receiving how much money from the next load. According to Butler, during this discussion, and in Ruppel's presence, "[Foster] said John R. and himself would split what was left after everything was paid." Butler concluded his review of the meeting at the Marina Hotel by testifying that Ruppel gave Foster $20,000 during the meeting.

Ruppel contends that the admission of this testimony, including Foster's statement that he and Ruppel were splitting "what was left after everything was paid," was hearsay testimony that violated his Sixth Amendment right to confront the witness against him. We see no problem with his evidence.

Butler's testimony was admitted to show that there had been a meeting of the conspirators attended by the appellant where the nature of the venture and Ruppel's intent were expressly addressed. Standing alone, Foster's statement that he and Ruppel would be splitting the profits would constitute hearsay if Ruppel had not been present at the meeting. Here, however, Butler testified to Ruppel's personal participation in the meeting and to talk that itself established the anticipation if

not implied agreement that Ruppel would profit from the venture. We need not reach the law on admissions by silence or the Sixth Amendment right of confrontation.[5]

6. Tape Recordings of Telephone Calls

As part of its case, the Government offered a tape recording made by coconspirator Butler of several post-arrest telephone calls that he made to Ruppel, Holland, and others in Tennessee.[6] Because parts of several of the telephone conversations on the tape were difficult to hear, the Government also offered a transcript of each of the calls so that the court and the jurors might understand more easily the tape as it was played.

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[5] We need not decide whether the admission of coconspirator Washington's testimony that Butler had told him "it was [Holland's and Foster's] boat load. They got the money from [Ruppel. Ruppel] takes his part back off the top and then splits it with them" and [Foster, Ruppel, and Holland] split the profit," requires a reversal. Because this testimony was substantially the same as Butler's own testimony — indicating that Ruppel had a significant financial interest in the next shipment of marijuana — even if these statements were inadmissible post-arrest utterances not made during the course of the conspiracy, *see United States v. Postal*, 589 F.2d 862, 888 (5th Cir.), *cert. denied*, 444 U.S. 832, 100 S.Ct. 61, 62 L.Ed.2d 40 (1979), they are, as conceded in the appellant's brief "merely a recital of Charles Foster's . . . assertion that he and [Ruppel] were to 'split what was left after everything was paid.' " Accordingly, Washington's testimony added nothing, and its reception in evidence was harmless.

[6] Butler recorded six telephone conversations onto a single tape. The parties to the calls were as follows:

No. 1 Butler and Operator,
No. 2 Butler and Holland,
No. 3 Butler, Operator, and Triangle Bonding,
No. 4 Butler and Ruppel,
No. 5 Butler and Holland; Butler and Ruppel and
No. 6 Butler and Two Operators.

Over the objections of Ruppel's counsel, the district judge admitted the tape and the Government's transcript. A transcript prepared by counsel for Ruppel also was admitted in evidence. The judge concluded that the purpose behind recording the telephone conversations was not to violate a federal or state criminal statute, that the conversations between Butler and Ruppel were admissible as admissions, and that the other conversations on the tape possessed such circumstantial guarantees of trustworthiness as not to be excluded by the hearsay rule. With one exception, we disagree with the appellant's objections to the tape and transcripts.

Federal law excludes from evidence the contents of a recorded telephone conversation when the recording is made "for the purpose of committing [a] criminal . . . act in violation of the . . . laws of the United States or of any State." 18 U.S.C. §§ 2511, 2515. Ruppel contends that the recording was made so that law enforcement agencies could be furnished with evidence of his involvement in the marijuana smuggling operation if he refused Butler's demands for money and that this conduct constituted blackmail and extortion.[7] This contention was rejected by the district judge. After a hearing, he found that "the purpose for making the phone calls to Mr. Holland and Mr. Ruppel was to somehow enhance the witness's position as far as plea bargaining is concerned," and that the federal statute prohibiting interception of a wire communication for the purpose of committing a criminal act had not been violated. The district judge's finding was based on the plausible testimony of Butler, the person who had initiated the telephone calls. The burden was on Ruppel to demonstrate that Butler's recording of the conversations was unlawful. *See United States v. Phillips*, 540 F.2d 319, 325-26 (8th Cir.), *cert. denied*, 429 U.S. 1000, 97 S.Ct. 530, 50 L.Ed.2d 611 (1976). Our review of the record does not show that this burden was discharged. As a result, the district judge was not

clearly erroneous when he found no violation of federal or state law.

The appellant next challenges the admission of the taped conversations between Butler and Holland. The district judge admitted these conversations as an exception to the hearsay rule because he found they contained "sufficient circumstantial guarantees of trustworthiness." *See* Fed.R. Evid. 803(24).

We agree with the appellant that the two telephone conversations between Butler and Holland should not have been admitted in evidence. The record reveals only that Butler twice called Holland: once to arrange a face-to-face meeting, another time to discuss how Foster had disappeared without reimbursing several of the participants for their expenses from the marijuana smuggling operations. Without more, there was nothing intrinsic in the circumstances surrounding either of these telephone conversations which would provide a guarantee of trustworthiness equivalent to the exceptions to the hearsay rule. *See, e.g., Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961) (newspaper article describing fire during construction of courthouse admitted in evidence as possessing equivalent guarantees of trustworthiness as found in exceptions to hearsay rule).

Nonetheless, we conclude that the admission in evidence of the telephone conversations between Butler and Holland was harmless and did not prejudice the appellant at his trial. At most, the conversations indicated that Ruppel was a participant in the financing of the marijuana smuggled on the Agnes Pauline. Evidence of the appellant's involvement with the Agnes Pauline shipment, however, was introduced both through the recorded telephone conversations between Butler and Ruppel and through Butler's prior testimony of Ruppel's involvement with other conspirators in the planning and

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[7] *See* 18 U.S.C. § 873 (blackmail); 18 U.S.C. § 875(d) (extortion).

financing of the shipment of marijuana during the meeting at the DFW Airport's Marina Hotel. Thus, although inadmissible, the contents of the two Butler-Holland telephone conversations duplicated other admissible evidence showing Ruppel's involvement in the conspiracy and, as such, was harmless in that it added nothing to the Government's case against him.

We do not agree with the appellant's contention that portions of the taped conversations between Butler and Holland and between Butler and Ruppel are so inaudible that the entire conversation should not have been admitted. "Tape recordings which are only partially intelligible are admissible unless those portions are so substantial as to render the recording as a whole untrustworthy." *United States v. Llinas*, 603 F.2d 506, 508 (5th Cir. 1979), *cert. denied*, 444 U.S. 1079, 100 S.Ct. 1030, 62 L.Ed.2d 762 (1980); *accord, United States v. Greenfield*, 574 F.2d 305, 307 (5th Cir.), *cert. denied*, 439 U.S. 860, 99 S.Ct. 178, 58 L.Ed.2d 168 (1978). This determination is left to the sound discretion of the judge, *Llinas*, 603 F.2d at 508; *Greenfield*, 574 F.2d at 307, and, in light of the lengthy hearing on admissibility and the precautions taken by the trial court when the tape was played, we find no abuse of discretion.

Likewise, the district judge did not abuse his discretion when he allowed the jury to follow a Government-prepared transcript as it listened to the tape. We previously have held that a transcript of a tape recorded conversation is admissible to aid the jurors' hearing of the tape. *United States v. Rochan*, 563 F.2d 1246, 1250 (5th Cir. 1977); *see Greenfield*, 574 F.2d at 307. The procedures we set out in *United States v. Onori*, 535 F.2d 938, 948-49 (5th Cir. 1976), were followed by the district judge. Counsel for Ruppel was unable to agree with the Government's version of the tapes, so both parties prepared

and introduced transcripts. The jury properly was cautioned in advance that

> the transcription is available for your assistance only. You will be governed by what you hear in the tape .... If what you hear differs from what's on the transcription, you'll be governed by what you hear.

Immediately before the tape was played, the jury was again cautioned by the district judge,

> You are specifically instructed, however, that whether the transcript correctly or incorrectly reflects the contents of the conversation or the identity of the speakers is entirely for you to determine based upon your own evaluation of the testimony that you've heard concerning the transcript, and from your own examination of the transcript in relation to your hearing of the tape recording itself as the primary evidence of its contents. In other words, the tape recording is the primary evidence of the contents, and the transcript is to assist you in evaluating the primary evidence. If you determine that the transcript is in any respect incorrect, then you should disregard it to that extent. Disregard — if you cannot determine from the tape that particular worlds were spoken, you will disregard the transcript insofar as those particular words are concerned.

7. & 8. Instructions to the Jury

Ruppel raises two issues with respect to the district judge's instructions to the jury at the close of the trial. First, the appellant claims that the instruction on character evidence both created the impression that character evidence alone may not

give rise to a reasonable doubt and discounted the significance of his character evidence.[8] The judge charged:

> You will recall that [Defendant Ruppel] introduced evidence tending to establish his good reputation for truth and voracity [sic] and general character in the community. The evidence may indicate to you that it's improbable that a person of such good character would commit the crimes charged. However, such evidence does not preclude the Defendant from being so involved. You should consider this evidence along with all the other evidence in the case in determining the guilt or innocence of the Defendant for you are the sole and exclusive judges of the facts in the case and the weight and credibility to give all the evidence in the case.

There is, of couse, no ritualistic incantation or magic formula that the judge must recite in his charge on character evidence. The rule in this circuit is that, when presented, evidence of "good character should be considered together with all other evidence in a case and may itself give rise to a

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[8] Counsel for the appellant did not object to the district judge's instruction on character evidence after the jury retired and, absent plain error, would be precluded from contesting the instruction in this court. *See* Fed R. Crim.P. 30. It is clear from the dialogue between the court and counsel, however, that the judge had considered fully the appellant's requested instruction on character evidence during a prior conference at which the proposed charge of the court was discussed. The instruction also had been filed in advance with the district court and is part of the record on appeal. Moreover, because it was the apparent intention of the district judge to allow counsel for the appellant an objection when the charge did not conform substantially to his requested instructions, we consider the appellant's argument concerning the instruction on character evidence. *See United States v. Davis*, 583 F.2d 190, 194-95 (5th Cir. 1978); *see also* 2 C. Wright, Federal Practice and Procedure § 484, at 288-90 (1969).

reasonable doubt." *See United States v. Callahan*, 588 F.2d 1078, 1085 (5th Cir.), *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979). So long as the charge correctly states the law to the jury it matters not what words the judge chooses to employ. *Kayo Oil Co. v. Sammans*. 321 F.2d 729, 730 (5th Cir. 1963).

The instruction given by the judge correctly expresses the law of this circuit. The jury was told that they should "consider [character] evidence along with all other evidence . . . in determining the guilt or innocence of the Defendant." Inasmuch as the ultimate determination of the accused's "guilt or innocence" is similar to a finding of "reasonable doubt," we cannot say that the charge did not convey the proper instruction to the jury. We previously have approved an instruction that similarly substituted the phrase "along with all [the] other evidence" and did not stress that "character evidence standing alone is sufficient to raise a reasonable doubt." *See United States v. Fontenot*, 483 F.2d 315, 323 (5th Cir. 1973). Nor can the appellant complain that the judge told the jury that "[character] evidence does not preclude the Defendant from being . . . involved" in criminal activity since that instruction is a correct statement of the law.

To be sure, had the district judge submitted the previously approved jury instruction on character evidence drafted by the Fifth Circuit District Judge's Association,[9] and requested

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[9] Where a Defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, the jury should consider such evidence along with all the other evidence in the case.

Evidence of a Defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character in respect to those traits would commit such a crime.

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by the appellant, this much of our opinion would be unnecessary. *Callahan*, 588 F.2d at 1086. Nonetheless, so long as the charge accurately reflects the law and the facts, the district judge is vested with broad discretion in formulating his charge, E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 7.01, at 198 (1977), and we will not lightly disturb his judgment.

The appellant's other objection to the court's charge is far more serious. In the face of clear and unmistakable authority that a federal trial judge in this circuit instruct the jury on the presumption of innocence at the close of the case, *see United States v. Fernandez*, 496, F.2d 1294, 1299 (5th Cir. 1974); *United States v. Davila-Nater*, 474 F.2d 270, 285 (5th Cir. 1973), the district judge chose only to instruct the jury to "recall" "some general definitions and instructions," including the presumption of innocence, given at the outset of the trial.[10] While we approve Judge Parker's decision to follow the better practice of instructing the jury on the fundamentals of a criminal trial prior to taking any evidence, *see* ABA Advisory Committee on the Criminal Trial, Trial by Jury § 4.6(d) (1968), his subse-

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The jury will always bear in mind, however, that a law never imposes upon a Defendant in a criminal case the burden or duty of calling any witness or producing any evidence.
U.S. Fifth Circuit District Judges Association, Pattern Jury Instructions — Criminal Cases 37 (1979).

[10] Specifically, the jury was charged,
You recall at the first of the case I gave you some general definitions and instructions. I'm not going to repeat those, but simply ask you to recall them. Specifically, I ask you to recall the definitions on direct and circumstantial evidence, the presumption of innocence, a Defendant's right not to take the stand, if a Defendant so chooses, and the Defendant's right to require the Government to prove each and every element of its case beyond a reasonable doubt.

4.6(d) (1968), his subsequent failure to repeat those instructions with the remainder of his charge at the close of the trial — 11 days later — cannot be approved.

> The presumption of innocence is one of the fundamentals of the law. It is not to be minimized or denied to any one accused of crime .... One accused of crime has the right to have the jury take it to the jury room with them as the voice of the law.

Merrill v. United States, 338 F.2d 763, 768 (5th Cir. 1964) (quoting *Dodson v. United States*, 23 F.2d 401, 403 (4th Cir. 1928)).

Ideally, once the jury is sworn and the trial has begun, the trial judge should explain to the jurors their function as judges of the facts, the presumption of innocence, the burden of reasonable doubt, the roles of the judge and the lawyers, and other preliminary matters that are necessary to guide them through the trial. *See* ABA Advisory Committee on the Criminal Trial, Trial by Jury 116-18 (1968). When both sides have rested and have completed their arguments to the jury, the district judge must repeat the initial instructions as part of the court's charge at least insofar as they involve definitions of criminal offenses and the rules of evidence.

> Even if certain instructions are given after the jury is sworn, it will nonetheless be necessary for the jury to be instructed before they retire. The instructions given at this time will include at least some of the instructions which were given when the trial opened.

Id. at 117-18; *see also* 8A Moore's Federal Practice ¶ 30.02, at 30-5 (2d ed. 1981) ("instructions of importance delivered during the trial would necessarily be repeated in the court's charge").

Although the district judge erred by failing to instruct the jury on the presumption of innocence at the close of the trial, a new trial is not required.

> [T]he failure to give a requested instruction on the presumption of innocence .... must be evaluated in light of the totality of the circumstances — including the instructions to the jury, the arguments of counsel, whether the weight of evidence was overwhelming, and other relevant factors.

Kentucky v. Whorton, 441 U.S. 786, 789, 99 S.Ct. 2088, 2090, 60 L.Ed.2d 640 (1979). The district judge charged the jury on the presumption of innocence at the beginning of the trial and referred to these instructions at the outset of his final charge. Appellant's counsel referred to the presumption of innocence during his closing argument. Given this background, we are unwilling to believe that the jury retired to deliberate less than fully aware of the presumption of innocence.[11]

AFFIRMED.

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[11] The appellant also has argued that the evidence presented by the Government is insufficient to support his convictions. We have reviewed the record. In light of Hamm's testimony that the appellant met with him to discuss the purchase of a shrimping vessel, the Monkey, Butler's testimony that the appellant met with him and Holland and Foster at the DFW Airport's Marina Hotel to discuss the purchase of another shrimping vessel to transport marijuana, and the contents of tapes of Butler's post-arrest telephone calls to Ruppel, we do not think that a reasonably minded jury must have entertained a reasonable doubt about the appellant's guilt. *See United States v. Cardona*, 650 F.2d 54, 57 (5th Cir. 1981).

ORDER OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT A

NO. 80-1962

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN RUPPEL,
Defendant-Appellant.

- - - - -

Appeal from the United States District Court for the Eastern District of Texas

- - - - -

Filed March 2, 1982.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 25, 1982, 5 Cir., 198__, _____ F.2d_____).

(March 2, 1982)

Before THORNBERRY, REAVLEY and POLITZ, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley

United States Circuit Judge

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[9] Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

ORDER OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING MOTION TO STAY MANDATE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

No. 80-1962

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN RUPPEL,
Defendant-Appellant,

Appeal from the United States District Court for the Eastern District of Texas

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Filed March 10, 1982.

ORDER:

☑ The motion of appellant, John Ruppel, for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☐ The motion of appellant, John Ruppel, for ☒ stay ☐ recall and stay of the issuance of the mandate pending peti-

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452, October 14, 1980.

tion for writ of certiorari is GRANTED to and including March 31, 1982, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of _____
for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

☐ The motion of _____
for a further stay of the issuance of the mandate is DENIED.

/s/ Thomas M. Reavley
UNITED STATES CIRCUIT JUDGE

ORDER OF SUPREME COURT OF THE UNITED STATES STAYING MANDATE

No. A-800

JOHN RUPPEL,

Petitioner

v.

UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the execution and enforcement of the mandate of the United States Court of Appeals for the Fifth Circuit, case No. 80-1962, be, and the same is hereby, stayed pending the timely filing and disposition by this Court of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to continue in effect pending the sending down of the judgment of this Court.

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 19th day of March, 1982.

INDICTMENT B-79-10-CR

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA
VS.
MARTIN MARION SNEED, SR.;
JOHN RUPPEL;
CARLOS GERDES, also known as CARLOS SAN RAMON;
RAYMOND EUGENE HAWKINS;
CHARLES ELBERT FOSTER, also known as "MUSCLES";
JAMES LOUIS HOLLAND;
MARTIN MARION SNEED, JR.
ELMER GLENN CULVER;
JAMES EDDIE WIMBERLY;
THOMAS T. WIMBERLY;
ROBERT HAMM;
HAROLD F. HANNON;
DONALD SNEED;
CLYDE E. SNEED;
CHARLES NOEL TALKINGTON;
WILLIS JUDGE BUTLER;
BRYANT O'NEAL;
FRANK BRYANT;
CLIFFORD J. SWIERE;
RONALD SPENCER RAY;
BETH C. ANDERSON, also known as BETH C. HOLLAND;
and LURLINE VICE

} CRIMINAL NO. B-79-10-CR

Filed July 10, 1979.

SUPERSEDING
INDICTMENT

THE GRAND JURY CHARGES:

Count 1

Violation: 18 U.S.C. §1962(d) & 1963(a)

Penalty: Imprisonment for not more than 20 years, fine of not more than $25,000, or both.

1. That from on or about an unknown date in August of 1976, and continuously thereafter, up to and including December 12, 1978, within the Eastern District of Texas, and elsewhere, the Defendants MARTIN MARION SNEED, SR., JOHN RUPPEL, CARLOS GERDES, also known as CARLOS SAN RAMON, RAYMOND EUGENE HAWKINS, CHARLES ELBERT FOSTER, also known as "MUSCLES", JAMES LOUIS HOLLAND, MARTIN MARION SNEED, JR., ELMER GLENN CULVER, JAMES EDDIE WIMBERLY, THOMAS T. WIMBERLY, ROBERT HAMM, HAROLD F. HANNON, DONALD SNEED, CLYDE E. SNEED, CHARLES NOEL TALKINGTON, WILLIS JUDGE BUTLER, BRYANT O'NEAL, FRANK BRYANT, CLIFFORD J. SWIERE, RONALD SPENCER RAY, and BETH C. ANDERSON, also known as BETH C. HOLLAND being employed by and associated with an enterprise, the activities of which affected interstate and foreign commerce, to wit: a group of individuals associated in fact to smuggle marihuana, a Schedule I non-narcotic controlled substance, into the United States from outside the United States and to possess and distribute such marihuana, did unlawfully and knowingly combine, conspire, confederate, and agree together with each

other and with other persons to violate Title 18, United States Code, Section 1962(c).

2. It was part of the conspiracy that the Defendants would conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity.

3. It was further a part of the conspiracy that the Defendants would illegally smuggle approximately 172,000 pounds of marihuana from the vicinity of Santa Marta, Colombia to places in the State of Texas and throughout the United States, in violation of Title 21, United States Code, Section 952.

4. It was further a part of the conspiracy that the Defendants would illegally possess and distribute marihuana in violation of Title 21, United States Code, Section 841(a)(1).

5. It was further a part of the conspiracy that the Defendants would travel in interstate and foreign commerce to promote, manage, establish, and carry on an unlawful activity — marihuana smuggling, possession and distribution — in violation of Title 18, United States Code, Section 1952(a)(3).

6. It was further a part of the conspiracy that at least five (5) shipments of marihuana would be smuggled into the United States as follows:

a. On or about June 1, 1977, the shrimp vessel "Monkey" entered the United States from places outside of the United States, with approximately 35,000 pounds of marihuana and landed in the vicinity of Orange, Orange County, Texas.

b. On or about January 27, 1978, the shrimp vessel "Jubilee" entered the United States from places outside of the United States, with approximately 37,000 pounds of marihuana and landed in the vicinity of High Island, Texas.

c. On or about April 4, 1978, the shrimp vessel "Jubilee" entered into the United States from places outside of the United States, with approximately 30,000 pounds of marihuana and landed in the vicinity of High Island, Texas.

d. On or about May 2, 1978, the shrimp vessel "Bayou Blues" entered the United States from places outside of the United States, with approximately 35,000 pounds of marihuana and landed in the vicinity of Orange, Orange County, Texas.

e. On or about November 29, 1978, the shrimp vesel "Agnes Pauline" entered into the United States from places outside of the United States, with approximately 40,000 pounds of marihuana and landed in the vicinity of Port Arthur, Jefferson County, Texas.

7. It was further a part of the conspiracy that the Defendant MARTIN MARION SNEED, SR. organized, financed, managed, and provided the landing sites for the shipments on the "Monkey" and the "Bayou Blues".

8. It was further a part of the conspiracy that the Defendant JOHN RUPPEL organized, financed, and managed the shipments on the "Monkey", the "Jubilee" (both January 27, 1978 and April 4, 1978), and the "Agnes Pauline".

9. It was further a part of the conspiracy that the Defendant CARLOS GERDES, also known as CARLOS SAN RAMON, organized, financed, and managed the shipments on the "Monkey" and the "Jubilee" (both January 27, 1978 and April 4, 1978).

10. It was further a part of the conspiracy that the Defendant RAYMOND EUGENE HAWKINS organized, financed, and managed the shipments on the "Monkey" and the "Bayou Blues".

11. It was further a part of the conspiracy that the Defendant CHARLES ELBERT FOSTER, also known as "MUSCLES", organized, financed, and managed the five (5) shipments, referred to in paragraph 6, a through 3, as set out above.

12. It was further a part of the conspiracy that the Defendant JAMES LOUIS HOLLAND organized and managed

the shipments on the "Monkey" and the "Jubilee" (both January 27, 1978 and April 4, 1978).

13. It was further a part of the conspiracy that the Defendants MARTIN MARION SNEED, JR., ELMER GLENN CULVER, JAMES EDDIE WIMBERLY, THOMAS T. WIMBERLY, ROBERT HAMM, HAROLD F. HANNON, DONALD SNEED and CLYDE E. SNEED loaded and unloaded shrimp vessels and trucks and assisted in the distribution of marihuana.

14. It was further a part of the conspiracy that the Defendants CHARLES NOEL TALKINGTON, WILLIS JUDGE BUTLER, and others obtained and drove trucks containing marihuana from the shrimp vessels to various distribution points.

15. It was further a part of the conspiracy that the Defendants BRYANT O'NEAL, FRANK BRYANT, CLIFFORD J. SWIERE, and RONALD SPENCER RAY would crew shrimp boats used to smuggle marihuana.

16. It was further a part of the conspiracy that the Defendant BETH C. ANDERSON, also known as BETH C. HOLLAND, assisted the Defendant JAMES LOUIS HOLLAND in the distribution of marihuana from shipments on the "Monkey", the "Jubilee" (both January 27, 1978 and April 4, 1978), and the "Agnes Pauline".

OVERT ACTS

In furtherance of the conspiracy and to affect the objects thereof, the Defendants MARTIN MARION SNEED, SR., JOHN RUPPEL, CARLOS GERDES, also known as CARLOS SAN RAMON, RAYMOND EUGENE HAWKINS, CHARLES ELBERT FOSTER, also known as "MUSCLES", JAMES LOUIS HOLLAND, MARTIN

MARION SNEED, JR., ELMER GLENN CULVER, JAMES EDDIE WIMBERLY, THOMAS T. WIMBERLY, ROBERT HAMM, HAROLD F. HANNON, DONALD SNEED, CLYDE E. SNEED, CHARLES NOEL TALKINGTON, WILLIS JUDGE BUTLER, BRYANT O'NEAL, FRANK BRYANT, CLIFFORD J. SWIERE, RONALD SPENCER RAY, and BETH C. ANDERSON, also known as BETH C. HOLLAND, Performed the following overt acts, among others, in the Eastern District of Texas, and elsewhere:

1. That in August of 1976, on a date unknown to the Grand Jury, JOHN RUPPEL, CARLOS GERDES, also known as CARLOS SAN RAMON, BRYANT O'NEAL and ROBERT HAMM inspected and purchased the shrimpboat "Monkey" for approximately $148,500.00.

2. In September of 1976, on a date unknown to the Grand Jury, BRYANT O'NEAL, ROBERT HAMM and another person, unknown to the Grand Jury, sailed the shrimp vessel "Monkey" from Aransas Pass, Texas.

3. That in February of 1977, on a date unknown to the Grand Jury, MARTIN MARION SNEED, SR., CHARLES ELBERT FOSTER, also known as "MUSCLES", JAMES EDDIE WIMBERLY and WILLIS JUDGE BUTLER met in the vicinity of Vinton, Louisiana to discuss possible landing and unloading sites for the smuggling of marihuana.

4. That on or about February 24, 1977, MARTIN MARION SNEED, SR., CARLOS GERDES, also known as CARLOS SAN RAMON, RAYMOND EUGENE HAWKINS, CHARLES ELBERT FOSTER, also known as "MUSCLES", and WILLIS JUDGE BUTLER met in the vicinity of Orange, Orange County, Texas, and agreed to use the buildings and facilities at Sneed Shipbuilding, Incorporated to land and unload shipments of marihuana.

5. That on or about May 31, 1977, CHARLES NOEL TALKINGTON and WILLIS JUDGE BUTLER met with MARTIN MARION SNEED, SR., CARLOS GERDES, also known as CARLOS SAN RAMON, RAYMOND EUGENE HAWKINS, CHARLES ELBERT FOSTER, also known as "MUSCLES", JAMES LOUIS HOLLAND, and JAMES EDDIE WIMBERLY at Sneed's Shipbuilding, Incorporated in the vicinity of Orange, Orange County, Texas.

6. That on or about June 1, 1977, the shrimp vessel "MONKEY" arrived at Sneed Shipbuilding, Incorporated crewed by BRYANT O'NEAL and four (4) other persons to the Grand Jury unknown, and unloaded a multiple ton load of marihuana weighing approximately 35,000 pounds.

7. That on or about June 1, 1977, the marihuana listed in Paragraph 6 about was transported to the area of Meridian, Texas, where it was weighed and distributed by CARLOS GERDES, also known as CARLOS SAN RAMON, RAYMOND EUGENE HAWKINS, CHARLES ELBERT FOSTER, also known as "MUSCLES", JAMES LOUIS HOLLAND, CHARLES NOEL TALKINGTON and WILLIS JUDGE BUTLER.

8. That on or about June 2, 1977, RAYMOND EUGENE HAWKINS left the vicinity of Meridian, Texas with approximately 2400 pounds of marihuana from the shrimp vessel "MONKEY".

9. That on or about June 22, 1977 and June 25, 1977 CHARLES NOEL TALKINGTON and WILLIS JUDGE BUTLER delivered approximately 6000 pounds of marihuana to JAMES LOUIS HOLLAND and ELMER GLENN CULVER In the vicinity of Newport, Tennessee.

10. That on or about October 26, 1977, JOHN RUPPEL, BRYANT O'NEAL, and ROBERT HAMM met in the

vicinity of Fort Myers, Florida and purchased the shrimp boat "JUBILEE" for the amount of approximately $215,000.00.

11. That during October of 1977, on a date unknown to the Grand Jury, JOHN RUPPEL, CARLOS GERDES, also known as CARLOS SAN RAMON, CHARLES ELBERT FOSTER, also known as "MUSCLES", JAMES LOUIS HOLLAND, WILLIS JUDGE BUTLER and an unindicted co-conspirator met in an apartment in the vicinity of Houston, Texas and discussed possible landing and unloading sites for the smuggling of marihuana into the United States.

12. That in January of 1978, on a date unknown to the Grand Jury, CHARLES ELBERT FOSTER, also known as "MUSCLES", leased Thompson's Seafood in High Island, Texas, to be utilized as an unloading site for the smuggling of marihuana into the United States.

13. That on or about January 27, 1978, the shrimp vessel "JUBILEE" docked in the vicinity of High Island, Texas where CARLOS GERDES, also known as CARLOS SAN RAMON, CHARLES ELBERT FOSTER, also known as "MUSCLES", JAMES LOUIS HOLLAND, THOMAS T. WIMBERLY, ROBERT HAMM, HAROLD F. HANNON, and CHARLES NOEL TALKINGTON unloaded approximately 37,000 pounds of marihuana imported into the United States from places outside of the United States.

14. On or about January 27, 1978, the shrimp vessel "JUBILEE" was crewed by BRYANT O'NEAL and three (3) unknown individuals.

15. That on or about January 17, 1978, approximately 37,000 pounds of marihuana, smuggled into the United States aboard the shrimp vessel "JUBILEE", was transported by WILLIS JUDGE BUTLER and an unindicted co-conspirator to the vicinity of Crockett, Houston County, Texas.

16. That on or about January 29, 1978, CARLOS GERDES, also known as CARLOS SAN RAMON, CHARLES ELBERT FOSTER, also known as "MUSCLES", JAMES LOUIS HOLLAND, THOMAS T. WIMBERLY, ROBERT HAMM, HAROLD F. HANNON, and CHARLES NOEL TALKINGTON weighed the approximately 37,000 pounds of marihuana from the shrimp vessel "JUBILEE".

17. That on or about February 2, 1978 and February 6, 1978 WILLIS JUDGE BUTLER and an unindicted co-conspirator transported approximately 6,000 pounds of marihuana to JAMES LOUIS HOLLAND in the vicinity of Newport, Tennessee.

18. That on or about March 7, 1978, MARTIN MARION SNEED, SR. and another individual flew from the vicinity of Orange, Orange County, Texas to the vicinity of Denton, Texas to arrange and discuss the smuggling of marihuana into the United States.

19. That on or about March 8, 1978, MARTIN MARION SNEED, SR. and another individual flew to the vicinity of Key West, Florida to discuss the use of the shrimp vessel "BAYOU BLUES" in the smuggling of marihuana into the United States of America.

20. That on or about April 4, 1978, the shrimp vessel "JUBILEE" arrived in the vicinity of High Island, Texas and unloaded approximately 35,000 pounds of marihuana.

21. That on or about April 4, 1978, CARLOS GERDES, also known as CARLOS SAN RAMON, CHARLES ELBERT ROSTER, also known as "MUSCLES", JAMES LOUIS HOLLAND, THOMAS T. WIMBERLY, ROBERT HAMM, HARRY F. HANNON, CHARLES NOEL TALKINGTON, WILLIS JUDGE BUTLER, and an unindicted co-conspirator weighed and distributed the ap-

proximately 30,000 pounds of marihuana unloaded from the shrimp vessel "JUBILEE".

22. That on or about April 9, 1978 and April 13, 1978, WILLIS JUDGE BUTLER and an unindicated co-conspirator transported approximately 6,000 pounds of marihuana to the vicinity of Newport, Tennessee and delivered the same to JAMES LOUIS HOLLAND.

23. That on or about May 2, 1978, the shrimp vessel "BAYOU BLUES" crewed by FRANK BRYANT, CLIFFORD J. SWIERE and RONALD SPENCER RAY, and another unidentified person, landed in the vicinity of Orange, Orange County, Texas, in the Eastern District of Texas, and unloaded approximately 35,000 pounds of marihuana which was delivered to MARTIN MARION SNEED, SR., RAYMOND EUGENE HAWKINS, DONALD SNEED, CLYDE E. SNEED, WILLIS JUDGE BUTLER and an unindicted co-conspirator and approximately 20 individuals unknown to the Grand Jury.

24. On or about May 2, 1978, WILLIS JUDGE BUTLER and an unindicted co-conspirator delivered approximately 15,000 pounds of marihuana mentioned in Paragraph 23 above to the vicinity of Crockett, Houston County, Texas, in the Eastern District of Texas, to RAYMOND EUGENE HAWKINS and another man unknown to the Grand Jury.

25. On or about May 2, 1978, MARTIN MARION SNEED, JR. delivered to WILLIS JUDGE BUTLER and an unindicted co-conspirator, in the vicinity of Orange, Orange County, Texas, in the Eastern District of Texas, approximately 1,000 pounds of marihuana.

26. On or about May 3, 1978, in the vicinity of Orange, Orange County, Texas, DONALD SNEED and CLYDE E. SNEED delivered approximately 1,029 pounds of marihuana to the home of two unindicted co-conspirators in the vicinity of Orange, Orange County, Texas.

27. On a date unknown to the Grand Jury, and believed to be in July of 1978, CHARLES ELBERT FOSTER, also known as "MUSCLES", JAMES LOUIS HOLLAND, WILLIS JUDGE BUTLER and another person unknown to the Grand Jury, met in the vicinity of Denton, Denton County, Texas, in the Eastern District of Texas, and discussed a future marihuana transaction.

28. On or about August 16, 1978, JOHN RUPPEL, CHARLES ELBERT FOSTER, also known as "MUSCLES", and JAMES LOUIS HOLLAND met in the vicinity of Dallas, Texas and discussed the smuggling of approximately 30,000 pounds of marihuana into the United States.

29. In August of 1978, on a date unknown to the Grand Jury, THOMAS T. WIMBERLY and WILLIS JUDGE BUTLER flew to the State of Florida and met with another individual and inspected "snapper boats" to be utilized in the smuggling of marihuana into the United States.

30. On or about September 11, 1978, four individuals traveled to the vicinity of Coden, Alabama and inspected the shrimp vessel "AGNES PAULINE".

31. On an unknown date, believed to be in October of 1978, WILLIS JUDGE BUTLER met with JAMES LOUIS HOLLAND and BETH C. ANDERSON, also known as BETH C. HOLLAND, in Knoxville, Tennessee and proceeded to a meeting with JOHN RUPPEL and received approximately $20,000.00 to be utilized as a down payment on the shrimp vessel "AGNES PAULINE".

32. That from on or about September 28, 1978, continuously up to and including November 8, 1978, numerous unindicted co-conspirators outfitted the shrimp vessel "AGNES PAULINE" in the vicinity of Port Bolivar, Texas.

33. On or about November 8, 1978, the shrimp vessel "AGNES PAULINE" sailed from the vicinity of Galveston,

Texas bound for the vicinity of Santa Marta, Colombia, South America.

34. That on or about November 15, 1978, BETH C. ANDERSON, also known as BETH C. HOLLAND, contacted persons hired to unload and transport the marihuana from the shrimp vessel "AGNES PAULINE" and informed them that the radios aboard the "AGNES PAULINE" were not functioning and to not attempt to contact the "AGNES PAULINE" via radio.

35. That on or about November 29, 1978, the shrimp vessel "AGNES PAULINE" arrived in the vicinity of Port Arthur, Jefferson County, Texas, in the Eastern District of Texas, and distributed approximately 40,063 pounds of marihuana to two (2) diesel tractor trailer trucks.

36. On or about November 29, 1978, numerous unindicted co-conspirators were arrested in the act of unloading approximately 40,063 pounds of marihuana mentioned in Paragraph 35 above.

37. That on or about November 30, 1978, JAMES LOUIS HOLLAND spoke with BETH C. ANDERSON, also known as BETH C. HOLLAND, and discussed the posting of bonds by JOHN RUPPEL for the twelve (12) individuals arrested from the shrimp vessel "AGNES PAULINE".

All in violation of Title 18, United States Code, Section 1962(d).

Count 3

Violation: 18 U.S.C. §1962(c) & 1963(a)(1)

Penalty: Imprisonment for not more than 20 years, fine of not more than $25,000 or both.

1. That from on or about August of 1976 and continuously thereafter, up to and including December 12, 1978, within the Eastern District of Texas and elsewhere, the Defendant

JOHN RUPPEL being employed by and associated with an enterprise, the activities of which affected interstate and foreign commerce, to wit: a group of individuals associated in fact to smuggle marihuana, a Schedule I non-narcotic Controlled Substance, into the United States from outside the country and to possess and distribute such marihuana, did unlawfully and knowingly conduct and participate, directly and indirectly, in the conduct of the enterprises's affairs through a pattern of racketeering activity.

2. The pattern of racketeering activity, as defined by Title 18, United States Code, Sections 1961(1)(B) and (D) and 1961(5) includes the following:

a. On or about June 1, 1977, in the Eastern District of Texas, JOHN RUPPEL smuggled into the United States from places outside of the United States approximately 35,000 pounds of marihuana and landed such marihuana in the vicinity of Orange, Texas aboard the shrimp vessel "Monkey", in violation of Title 21, United States Code, Section 952 and Title 18, United States Code, Section 2.

b. On or about June 1, 1977, in the Eastern District of Texas, JOHN RUPPEL possessed with intent to distribute and distributed approximately 35,000 pounds of marihuana which had landed in the vicinity of Orange, Texas aboard the shrimp vessel "Monkey", in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

c. On or about January 27, 1978, in the Southern District of Texas, JOHN RUPPEL smuggled into the United States from places outside of the United States approximately 37,000 pounds of marihuana and landed such marihuana in the vicinity of High Island, Texas aboard the shrimp vessel "JUBILEE", in violation of Title 21, United States Code, Section 952 and Title 18, United States Code, Section 2.

d. That on or about January 27, 1978, in the vicinity of Crockett, Houston County, Texas, JOHN RUPPEL possessed with intent to distribute and distributed approximately 37,000 pounds of marihuana which had landed in the vicinity of High Island, Texas aboard the shrimp vessel "JUBILEE", in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

e. On or about April 4, 1978, in the Southern District of Texas, JOHN RUPPEL smuggled into the United States from places outside of the United States approximately 35,000 pounds of marihuana and landed such marihuana in the vicinity of High Island, Texas aboard the shrimp vessel "JUBILEE", in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

f. That on or about April 4, 1978, in the vicinity of Crockett, Houston County, Texas, JOHN RUPPEL possessed with intent to distribute and distributed approximately 35,000 pounds of marihuana which had landed in the vicinity of High Island, Texas aboard the shrimp vessel "JUBILEE", in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

g. On or about November 29, 1978, in the Eastern District of Texas, JOHN RUPPEL smuggled into the United States from places outside of the United States approximately 47,063 pounds of marihuana and landed such marihuana in the vicinity of Port Arthur, Texas aboard the shrimp vessel "AGNES PAULINE", in violation of Title 21, United States Code, Section 952 and Title 18, United States Code, Section 2.

3. Through the aforesaid pattern of racketeering activity the Defendant JOHN RUPPEL acquired and maintained substantial monetary interests in the enterprise thereby making such interests subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1).

All in violation of Title 18, United States Code, Sections 1962(c) and 1963(a)(1).

Count 15

Violation: 21 U.S.C. §848

Penalty: Imprisonment for not less than 10 years, to life, a fine of not more than $100,000 and to criminal forfeiture.

That from on or about an unknown date, believed to be in October of 1976, and continuously thereafter up to and including January of 1978, in the Eastern District of Texas and elsewhere, the Defendant JOHN RUPPEL unlawfully, willfully and intentionally did violate Title 21, United States Code, Sections 841(a)(1) and 952 as alleged in Counts 1 and 3 of this Indictment, which are incorporated herein by reference, which violations were a part of a continuing series of violations of Subchapters 1 and 2 of the Drug Abuse Control Act of 1970 (21 U.S.C. §801, et. seq.) undertaken by the Defendant JOHN RUPPEL with at least five other persons with respect to whom the Defendant JOHN RUPPEL occupied a position of organizer, a supervisory position, and a position of management, and from which continuing series of violations the Defendant JOHN RUPPEL obtained substantial income and resources of which the United States seeks forfeiture, including all profits obtained by the Defendant JOHN RUPPEL in such continuing criminal enterprise, and of his interest in, claim against, and property and contractual right of any kind affording a source of influence over such enterprise, all in violation of Title 21, United States Code, Section 848.

Filed October 24, 1979.

INDICTMENT B-79-20-CR

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA

VS. B-79-20-CR

JOHN RUPPEL,
EDWARD FERRENTINO, and
CHARLES ELBERT FOSTER,
a/k/a "MUSCLES"

INDICTMENT

THE GRAND JURY CHARGES:

Count 1

Violation: 21 USC §846

Penalty: Not more than 5 years imprisonment, or a fine of not more than $15,000, or both

That from an unknown date in August of 1976, and continuously thereafter up to and including January 15, 1979, in the vicinity of Beaumont, Jefferson County, Texas, in the Eastern District of Texas, and elsewhere, JOHN RUPPEL, EDWARD FERRENTINO, and CHARLES ELBERT FOSTER, also known as "MUSCLES," willfully and knowingly did combine, conspire, confederate and agree together with each other and with others, named as unindicted co-conspirators, and others, unknown to the Grand Jury, to commit offenses against the United States of America, to wit: to violate Title 21, United States Code, Sections 841(a)(1) and

952, by knowingly, intentionally and unlawfully importing into the United States of America from places outside of the United States of America, specifically, Columbia, South America, approximately 147,000 pounds of marihuana, a Schedule I, non-narcotic Controlled Substance, and to knowingly, intentionally, and unlawfully possess with intent to distribute and to distribute the aforesaid 147,000 pounds of marihuana, in violation of Title 21, United States Code, Sections 846 and 963.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the Defendants, JOHN RUPPEL, EDWARD FERRENTINO, CHARLES ELBERT FOSTER, also known as "MUSCLES," and others named as unindicted co-conspirators where indicated, performed the following overt acts, among others:

1. That in August of 1976, on a date unknown to the Grand Jury, JOHN RUPPEL and other unindicted co-conspirators inspected and purchased the shrimpboat "MONKEY" for approximately $148,500.00.

2. That in September of 1976, on a date unknown to the Grand Jury, three (3) unindicted co-conspirators sailed the shrimpboat "MONKEY" from Aransas Pass, Texas.

3. That on or about May 31, 1977, the shrimpboat "MONKEY" landed at SNEED's SHIPBUILDING, INC., in the vicinity of Orange, Orange County, Texas, in the Eastern District of Texas, and was unloaded by numerous unindicted co-conspirators of approximately 35,000 pounds of marihuana.

4. That on or about June 1, 1977, the marihuana listed in paragraph 3, above, was transported to the vicinity of Meri-

dian, Texas, where it was weighed and distributed by numerous unindicted co-conspirators.

5. That on or about June 22, 1977, and June 25, 1977, approximately 6,000 pounds of marihuana were delivered to another unindicted co-conspirator in the vicinity of Newport, Tennessee.

6. In October of 1977, on a date unknown to the Grand Jury two (2) unindicted co-conspirators met with CHARLES ELBERT FOSTER, also known as "MUSCLES" in Bayou LaBatre, Alabama, and inspected and purchased the shrimpboat "JUBILEE."

7. That on or about October 26, 1977, JOHN RUPPEL and another unindicted co-conspirator in Fort Myers, Florida purchased the shrimpboat "JUBILEE" for approximately $215,000.00.

8. That on an unknown date, believed to be in October or November of 1977, JOHN RUPPEL and CHARLES ELBERT FOSTER, also known as "MUSCLES" met with several unindicted co-conspirators in an apartment in the vicinity of Houston, Texas, and discussed the smuggling of marihuana into the United States.

9. That in January of 1978, on a date unknown to the Grand Jury, CHARLES ELBERT FOSTER, also known as "MUSCLES," leased Thompson's Seafood in High Island, Texas, to be utilized as an unloading site for the smuggling of marihuana into the United States.

10. On or about January 27, 1978, the shrimpboat "JUBILEE" landed in the vicinity of High Island, Texas, where numerous unindicted co-conspirators unloaded approximately 37,000 pounds of marihuana.

11. On or about January 27, 1978, the 37,000 pounds of marihuana mentioned above in paragraph 10, was transported by truck to the vicinity of Crockett, Houston County,

Texas, where such marihuana was weighed, unloaded, and distributed.

12. That on or about February 2, 1978 and February 6, 1978, two (2) unindicted co-conspirators delivered approximately 6,000 pounds of marihuana from the shrimpboat "JUBILEE" to the vicinity of Newport, Tennessee, to another unindicted co-conspirator.

13. That on or about April 4, 1978, the shrimpboat "JUBILEE" landed in the vicinity of High Island, Texas, where numerous unindicted co-conspirators unloaded approximately 35,000 pounds of marihuana.

14. That on or about April 4, 1978, numerous unindicted co-conspirators transported the approximately 35,000 pounds of marihuana, mentioned in paragraph 13, above, to the vicinity of Crockett, Houston County, Texas, where it was weighed, unloaded, and distributed.

15. That on or about April 9, 1978 and April 13, 1978, two (2) unindicted co-conspirators delivered approximately 6,000 pounds of marijuana, from the shrimpboat "JUBILEE" to the vicinity of Newport, Tennessee, to another unindicted co-conspirator.

16. That on an unknown date believed to be in July or August of 1978, CHARLES ELBERT FOSTER, also known as "MUSCLES," EDWARD FERRENTINO and two (2) other unindicted co-conspirators met in the vicinity of Denton, Texas, in the Eastern District of Texas, and discussed a future marihuana transaction.

17. That on or about August 16, 1978, JOHN RUPPEL, CHARLES ELBERT FOSTER, also known as "MUSCLES," and two (2) unindicted co-conspirators met in the vicinity of Dallas, Texas, and discussed the smuggling of approximately 30,000 pounds of marihuana.

18. That on an unknown date, believed to be in September of 1978, two (2) unindicted co-conspirators met with JOHN

RUPPEL and EDWARD FERRENTINO in the vicinity of Gatlinburg, Tennessee, and discussed the purchase of the shrimpboat "AGNES PAULINE."

19. That on or about September 11, 1978, two (2) unindicted co-conspirators and two (2) others traveled to the vicinity of Mobile, Alabama, to purchase the shrimpboat "AGNES PAULINE."

20. That from on or about September 28, 1978, continuously up to and including November 8, 1978, numerous unindicted co-conspirators outfitted the shrimp vessel "AGNES PAULINE" in the vicinity of Port Boliver, Texas.

21. That on or about November 8, 1978, the shrimp vessel "AGNES PAULINE" sailed from the vicinity of Galveston, Texas.

22. That on or about November 29, 1978, the shrimp vessel "AGNES PAULINE" arrived in the vicinity of Port Arthur, Jefferson County, Texas, in the Eastern District of Texas, and distributed approximately 40,063 pounds of marihuana to two (2) diesel tractor trailer trucks.

23. That on or about November 29, 1978, numerous unindicted co-conspirators were arrested unloading approximately 40,063 pounds of marihuana mentioned in paragraph 22, above.

24. That on or about January 2, 1978 and January 3, 1978, an unindicted co-conspirator spoke with JOHN RUPPEL and another unindicted co-conspirator regarding the seizure of the "AGNES PAULINE" and the arrest of numerous unindicted co-conspirators.

All in violation of Title 21, United States Code, Sections 846 and 963.

Count 2

Violation: 21 USC §841 (a)(1)

Penalty: Not more than 5 years imprisonment or a fine of not more than $15,000, or both; a special parole term of at least 2 years, if imprisonment is imposed.

That on or about May 31, 1977, in the vicinity of Orange, Orange County, Texas, in the Eastern District of Texas, JOHN RUPPEL knowingly, intentionally and unlawfully, and not otherwise authorized or permitted by law, did possess with intent to distribute approximately 35,000 pounds of marihuana, a Schedule I non-narcotic Controlled Substance, in violation of Title 21, United States Code, Section 841 (a)(1) and Title 18, United States Code, Section 2.

Count 3

Violation: 21 USC §841 (a)(1)

Penalty: Not more than 5 years imprisonment or a fine of not more than $15,000, or both; a special parole term of at least 2 years if imprisonment is imposed.

That on or about January 27, 1978, in the vicinity of Crockett, Houston County, Texas, in the Eastern District of Texas, JOHN RUPPEL knowingly, intentionally and unlawfully, and not otherwise authorized or permitted by law, did possess with intent to distribute approximately 37,000 pounds of marihuana, a Schedule I non-narcotic Controlled Substance, in violation of Title 21, United States Code, Section 841 (a)(1) and Title 18, United States Code, Section 2.

Count 4

Violation: 21 USC §841(a)(1)

Penalty: Not more than 5 years imprisonment or a fine of not more than $15,000, or both; a special parole term of at least 2 years if imprisonment is imposed.

That on or about April 4, 1978, in the vicinity of Crockett, Houston County, Texas, in the Eastern District of Texas, JOHN RUPPEL knowingly, intentionally and unlawfully, and not otherwise authorized or permitted by law, did possess with intent to distribute approximately 35,000 pounds of marihuana, a Schedule I non-narcotic Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

Count 5

Violation: 21 USC §841(a)(1)

Penalty: Not more than 5 years imprisonment, a fine of not more $15,000, or both; a special parole term of at least 2 years if imprisonment is imposed.

That on or about November 29, 1978, in the vicinity of Port Arthur, Jefferson County, Texas, in the Eastern District of Texas, JOHN RUPPEL knowingly, intentionally and unlawfully, and not otherwise authorized or permitted by law, did possess with intent to distribute approximately 40,000 pounds of marihuana, a Schedule I non-narcotic Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

A TRUE BILL.

/s/ HATTIE BUNN
FOREMAN
OF THE GRAND JURY

JOHN H. HANNAH, JR.
UNITED STATES ATTORNEY

/s/ DAVID P. BAUGH
ASSISTANT UNITED STATES ATTORNEY

PRELIMINARY INSTRUCTIONS ON PRESUMPTION OF INNOCENCE AND REASONABLE DOUBT GIVEN BEFORE OPENING STATEMENTS

THE COURT: Ladies and gentlemen, before we get into the opening statements of the attorneys, I want to give you some preliminary instructions to assist you in performing your function in the trial of this case.

In a criminal case any person, any citizen of this country, charged with the commission of a violation of the law is presumed to be innocent. The burden rests on the Government to establish to your satisfaction beyond any reasonable doubt that the person charged is guilty as charged. This presumption of innocence remains with the Defendant all through the case until it is overborne by proof that satisfies you beyond a reasonable doubt that the presumption of innocence no longer remains with a Defendant. You must look to all the evidence introduced in the case and ask yourself whether or not you're satisfied beyond any reasonable doubt that the offense has been committed as charged in the Indictment. If you are so satisfied, then it will be your duty to convict the Defendant. But if there exists in your mind a reasonable, well-founded doubt of his guilt, then you must give the Defendant the benefit of that doubt and acquit him.

So, if there are two reasonable theories equally supported by the evidence; one consistent with guilt, the other consistent with innocence; you must adopt the theory consistent with innocence and acquit the Defendant, because he could not be said to be guilty beyond a reasonable doubt.

The term "reasonable doubt" means just what it implies, doubt founded on reason. It does not mean every conceivable kind of doubt. It does not mean a doubt purely imaginary or fanciful or one capricious or speculative. It simply means an honest doubt that appeals to reason and is founded on reason.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act on it without hesitation in the most important of your own personal affairs.

INSTRUCTIONS ON REASONABLE DOUBT AND THE PRESUMPTION OF INNOCENCE GIVEN BEFORE DELIBERATIONS

THE COURT: You recall at the first of the case I gave you some general definitions and instructions. I'm not going to repeat those, but simply ask you to recall them. Specifically, I ask you to recall the definitions on direct and circumstantial evidence, the presumption of innocence, a Defendant's right not to take the stand, if a Defendant so chooses, and the Defendant's right to require the Government to prove each and every element of its case beyond a reasonable doubt.

SUMMARY OF EVIDENCE AGAINST PETITIONER

The government's case was based almost entirely upon the testimony of three alleged co-conspirators, Willis Butler, Robert Hamm, and Larry Washington, who cooperated with the government in exchange for promises of leniency. Washington's capacity to implicate appellant dramatically increased after striking his deal and Butler was a perjurer who often changed his account of events.

Hamm's damaging testimony was his bare opinion that appellant Ruppel knew that the fishing vessel *Monkey* was to be used for marihuana hauling. Butler and Washington both gave testimony indicating that appellant Ruppel had a financial stake in the *Agnes Pauline* ; however, the jury acquitted defendant on the *Agnes Pauline* count and convicted him on the

Monkey count and the two *Jubilee* counts. The only evidence possibly incriminating appellant on the *Jubilee* shipments was his purchase of the vessel and his presence at a Houston apartment where the conspirators discussed the *Jubilee* load, and both Washington and Butler testified that appellant did not participate in the meeting and had not in fact arrived at the apartment when the *Jubilee* loading sites were discussed. Furthermore, the assertions of Washington and Butler linking defendant to the *Agnes Pauline* load were denied by James Holland, a disinterested convicted co-conspirator who did not cut a deal with the government.

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Petition for Writ of Certiorari has been forwarded, by first class mail, postage prepaid, to the Solicitor General, Department of Justice, Washington, DC 20530, to Robert G. Wortham, United States Attorney, Eastern District of Texas, Tyler, TX 75701, and to William G. Otis and Deborah Watson, Attorneys, Appellate Section, Criminal Division, U.S. Department of Justice, Washington, DC 20530, this 30 day of April, 1982.

Robert W. Ritchie by RAH

ROBERT W. RITCHIE

Opposition

Office - preme Court, U.S.
FILED
JUN 9 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2016

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOHN RUPPEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

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Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether the filing of additional charges against petitioner after his first trial resulted in a hung jury constituted "vindictive" prosecutorial action in violation of the Due Process Clause.

2. Whether the district court committed reversible error by failing to repeat at the close of the evidence its earlier instructions to the jury on the presumption of innocence and the government's burden of proof.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Blackledge v. *Perry*, 417 U.S. 21 ..... 4, 5, 6

Bordenkircher v. *Hayes*, 434 U.S. 357 4

Kentucky v. *Whorton*, 441 U.S. 786 8

North Carolina v. *Pearce*, 395 U.S. 711 ..... 4, 5, 6

United States v. *Davila-Nater*, 474 F. 2d 270 9

United States v. *Goodwin*, *637 F. 2d 250*, cert. granted, No. 80-2195 (Nov. 30, 1981) 5, 6, 7, 12

United States v. *Lovasco*, 431 U.S. 783 10

Constitution and statutes:

United States Constitution, Fifth Amendment (Due Process Clause) 4, 5

18 U.S.C. 2 2

18 U.S.C. 1962(c) 2

18 U.S.C. 1962(d) 2

21 U.S.C. 841(a)(1) 1, 2

Page

Constitution and statutes—Continued:

21 U.S.C. 846 ..... 1, 2
21 U.S.C. 848 2
21 U.S.C. 963 ..... 1, 2

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2016

JOHN RUPPEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 666 F. 2d 261.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1982. A petition for rehearing was denied on March 2, 1982. The petition for a writ of certiorari was filed on April 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioner was convicted on three counts of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts II-IV of Indictment B-79-20-CR), and of conspiring to violate federal drug laws, in violation of 21 U.S.C. 846 and 963

(Count I of Indictment B-79-20-CR). He was sentenced to five years' imprisonment and a $30,000 fine.

1. On May 1, 1979, the grand jury returned a 28-count indictment (B-79-10-CR) against petitioner, charging him and 23 co-defendants with various offenses including racketeering, smuggling a controlled substance, and possession of marijuana with intent to distribute it (I:1-45).[1] Specifically, petitioner was charged with the following offenses: conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Count I); engaging in the substantive offense of racketeering, in violation of 18 U.S.C. 1962(c) and 2 (Count III); and engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count XV).[2] Trial commenced in September 1979, but ended when the district court *sua sponte* declared a mistrial as to petitioner after the jury was unable to reach a verdict on any of the charges against him (II:341).

On October 24, 1979, the grand jury returned a new indictment against petitioner (B-79-20-CR), which charged him with conspiring to violate the drug laws, in violation of 21 U.S.C. 846 and 963 (Count I), and with four counts of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts II-V) (V:1-6). The drug conspiracy count of this indictment was based on the same course of conduct that underlay the RICO conspiracy count of the first indictment.[3] The four substantive drug counts of

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[1]The record citations in the text refer to the Record on Appeal.

[2]A superseding indictment was returned on July 10, 1979, but made no changes that affected petitioner.

[3]The major difference in the allegation of unlawful behavior between the drug conspiracy count of the new indictment and the RICO conspiracy count of the earlier indictment was that the former covered the period from August 1976 through January 15, 1979, whereas the latter covered only the period from August 1976 through December 12, 1978.

the second indictment were based on facts described in Count III of the first indictment (the substantive RICO count). Both the original indictment and the second indictment were then consolidated for trial (II:366). Prior to trial, the government dismissed the RICO conspiracy count—Count I of the original indictment—to avoid any possible duplicity with the subsequent drug conspiracy count (XII:13).

Trial on these charges commenced in February 1980. Following the completion of trial, petitioner was convicted of conducting an enterprise through a pattern of racketeering and of engaging in a continuing criminal enterprise (Counts III and XV of the original indictment), and of four substantive drug offenses (Counts II-V of the second indictment) (II:466, V:122-123; XII:13). Petitioner filed a motion for a new trial, based in part on the court's failure to dismiss the second indictment (II:474). The court rejected this argument, but granted petitioner's motion for a new trial on all charges on the ground that the government had failed to disclose fully to petitioner the terms of certain plea agreements it had consummated with two witnesses (III:617-620).

Petitioner was retried in May 1980, along with co-defendant Charles Elbert Foster, and was convicted on the drug conspiracy count and on three of the substantive drug counts charged in the second indictment (Counts I-IV).[4]

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[4]Petitioner was acquitted of all the charges against him in the first indictment (IV:913) and of Count V in the second indictment (IV:939).

The evidence at trial showed that from August 1976 to November 1978, petitioner and his co-conspirators agreed to, and did, import approximately 147,000 pounds of marijuana into the United States and arranged for its distribution throughout the country. The co-conspirators purchased four shrimping vessels— *Monkey, Jubilee, Bayou Blues* and *Agnes Pauline*—for use in their marijuana smuggling scheme. (The government linked petitioner to the purchase of all but

2. On appeal, petitioner claimed that his reindictment on additional charges after a mistrial on the original charges violated the Due Process Clause. Citing *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), petitioner argued that the second indictment should have been dismissed because bringing additional charges against him after he elected to proceed to trial on the original charges demonstrated a realistic likelihood of prosecutorial vindictiveness that the government failed to dispel.

The court of appeals rejected petitioner's argument (Pet. App. 4a-6a), holding that a defendant's exercise of a procedural right during his prosecution, such as electing to stand trial before a jury, was insufficient by itself to place on the prosecutor the burden of demonstrating the absence of vindictiveness in his subsequent acts. Relying on *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), the court found (Pet. App. 5a) that due process violations do not arise from action that discourages the exercise of some "procedural right," but rather from retaliation against the accused for "lawfully attacking his conviction." The court accordingly found that petitioner had failed to make out a claim of prosecutorial vindictiveness, stating (*id.* at 6a):

> [Petitioner's] first trial ended in a mistrial because the jury was unable to reach a verdict. Not only was there no conviction to attack, but a trial followed by a mistrial due to a hung jury presents different considerations than a conviction followed by a reversal. The mistrial follows as of course from the jury's inability to

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one of these boats—the *Bayou Blues*). Using these boats, the co-conspirators arranged for five different shipments of marijuana to be brought from Colombia into Texas, where it was unloaded into trucks and transported to various points for distribution (Tr. 771-911) ("Tr." refers to the transcript of the May 23—June 3, 1980 trial).

agree upon a verdict. Unlike an attack upon a conviction, a mistrial resulting from a hung jury does not result from any action taken by a defendant.

Absent evidence of actual retaliation, mere reindictment after a mistrial due to a hung jury is insufficient to demonstrate the realistic likelihood of prosecutorial vindictiveness to which *Pearce* and *Blackledge* apply. As [petitioner's] claim of prosecutorial vindictiveness is based solely on a reindictment following a hung jury, it is without merit.

ARGUMENT

1. The question presented in this case is nearly identical to that presented in *United States* v. *Goodwin*, cert. granted No. 80-2195 (Nov. 30, 1981). In *Goodwin*, the Fourth Circuit held that the prosecutor's substitution of felony charges for misdemeanor charges after the defendant had requested a jury trial on the misdemeanor charges created an appearance of vindictiveness necessitating reversal of the defendant's conviction on the felony charges (637 F. 2d 250). Although the court readily acknowledged that the record established that the prosecutor had not acted vindictively in seeking a felony indictment, the court reasoned that "the due process clause protects a defendant from both actual vindictiveness and the fear of retaliation for exercising" a procedural right (*id.* at 253). Citing *Pearce* and *Blackledge*, the court held that "the *fear* of prosecutorial vindictiveness, as well as *actual* vindictiveness," has a "chilling effect" on the exercise of procedural rights, and therefore is protected against under the Due Process Clause (*ibid.*). Finally, the court of appeals ruled in *Goodwin* that the prosecutor could not rebut the appearance of vindictiveness unless he presented evidence showing that "the increased charges could not have been brought before the defendant exercised his rights" (*id.* at 255).

We agree with the court below that the presumptions and prophylactic rules prescribed in *Pearce* and *Blackledge* have no application to this case. Those cases hold that before the government may increase charges or penalties following a criminal defendant's exercise of a post-conviction right of review, the increased penalty exposure must be justified by a narrowly defined showing of legitimate, nonvindictive motivating factors. In the absence of such a showing, the increase in penalty exposure is conclusively presumed to be the product of impermissible "vindictiveness."

As explained in our brief in *Goodwin*, a copy of which is being served on counsel for petitioner, there is no logical basis for extending *Pearce* and *Perry* beyond their setting to encompass an increase in the severity of charges during the pretrial stage of a criminal case. Increases in charges at the preliminary phase of criminal cases are both commonplace and appropriate in view of the continuous receipt by prosecutors of relevent information during the course of trial preparation. Likewise, criminal defendants typically exercise a wide variety of procedural rights throughout the pretrial phase of a criminal case; prosecutors expect defense counsel to do so in an adversary system. In this context, there is no reasonable basis to presume "vindictiveness" simply because the prosecutor modifies charges at a point subsequent in time to the defendant's exercise of some pretrial procedural right.

In view of the similarity between the question presented here and in *United States* v. *Goodwin, supra*, the Court should hold this case for disposition in light of its ruling in *Goodwin*.[5]

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[5]If the court holds that there is no presumption of "vindictiveness" based on the facts presented in *Goodwin*, the petition in this case should be denied. On the other hand, if the Court recognizes a presumption of

2. Petitioner also claims (Pet. 17-23) that the district court committed reversible error in failing to repeat during closing instructions its earlier instructions on the presumption of innocence and the government's burden of proof beyond a reasonable doubt. The court below properly rejected this claim.

a. At the beginning of trial, the court instructed the jury as follows (Tr. 128-130):

> In a criminal case any person * * * charged with the commission of a violation of the law is presumed to be innocent. The burden rests on the Government to establish to your satisfaction beyond any reasonable doubt that the person charged is guilty as charged. This presumption of innocence remains with the Defendant all through the case until it is overborne by proof that satisfies you beyond a reasonable doubt that the presumption of innocence no longer remains with a Defendant. You must look to all the evidence introduced in the case and ask yourself whether or not you're satisfied beyond any reasonable doubt that the offense has been committed as charged in the Indictment.
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> * * * * *
>
> The term "reasonable doubt" means just what it implies, doubt founded on reason. It does not mean every conceivable kind of doubt. It does not mean a doubt purely imaginary or fanciful or one capricious or speculative. It simply means an honest doubt that appeals to reason and is founded on reason. Proof beyond a reasonable doubt, therefore, is proof of such

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vindictiveness in *Goodwin*, it should remand the instant case to the district court to afford the government the opportunity to establish that it had legitimate, nonvindictive grounds for bringing additional charges.

> a convincing character that you would be willing to rely and act on it without hesitation in the most important of your own personal affairs.

At the close of the evidence, the court did not repeat these instructions. Instead, it reminded the jury of its earlier detailed charge (Tr. 2217):

> You recall at the first of the case I gave you some general definitions and instructions. I'm not going to repeat those, but simply ask you to recall them. Specifically, I ask you to recall the definitions on direct and circumstantial evidence, the presumption of innocence * * * and the Defendant's right to require the Government to prove each and every element of its case beyond a reasonable doubt.

b. We agree with petitioner that the district court should have repeated its earlier instructions on the presumption of innocence and the reasonable doubt standard. However, as the court below expressly found (Pet. App. 21a), the district court's failure to repeat all of those instructions did not constitute reversible error.[6] The totality of circumstances here clearly establishes that petitioner's right to a fair trial was not violated.

The jury was fully informed as to the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt at the beginning of trial. Moreover, the jury was specifically reminded by the court

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[6]This Court has held that failure to give *any* instruction on the presumption of innocence does not necessarily violate a defendant's right to a fair trial. Thus, in *Kentucky* v. *Whorton*, 441 U.S. 786, 789 (1979), the Court held that failure to give a requested instruction on the presumption of innocence "must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial."

of those detailed instructions before beginning deliberations, and was referred once again (Tr. 2217) to "the Defendant's right to require the Government to prove each and every element of its case beyond a reasonable doubt." Indeed, the court, in its closing instructions, referred to the government's burden of proving the defendant guilty beyond a reasonable doubt no fewer than 16 times (Tr. 2217, 2222, 2223, 2224, 2230, 2231, 2233, 2234, 2236, 2238, 2239, 2240, 2241, 2242, 2245, 2246). The prosecutor acknowledged in his closing argument the government's heavy burden of proof (Tr. 2143), and defense counsel also referred to the presumption of innocence and the government's burden of proving petitioner's guilt beyond a reasonable doubt (Tr. 2169, 2170). See, *e.g.*, *United States* v. *Davila-Nater*, 474 F. 2d 270, 284-285 (5th Cir. 1973).[7] Thus, the jury was repeatedly apprised by both the court and counsel of the government's burden of proof and the presumption of the defendant's innocence.

c. Petitioner also argues that, because the district court never explicitly stated that the indictment was not evidence, a substantial possibility exists that the jury in fact considered the indictment to be evidence of his guilt. This claim also is without merit. As an initial matter, petitioner never requested the court to give such an instruction, nor objected to the court's failure to do so. And, since petitioner did not

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[7]Petitioner also complains (Pet. 20-21) of the following instruction at the beginning of trial (Tr. 128-129): "This presumption of innocence remains with the Defendant all through the case until it is overborne by proof that satisfies you beyond a reasonable doubt that the presumption of innocence no longer remains with a Defendant." Petitioner argues (Pet. 21) that this instruction implied that "once the government's case excluded a reasonable doubt about petitioner's guilt, the burden shifted to petitioner to establish his innocence, not just a reasonable doubt about his guilt." Petitioner's argument, made for the first time in this Court, is without merit. Not only did petitioner fail to object to the instruction, but the instruction was merely a correct statement of the law concerning the presumption of innocence.

raise this issue in the court below, he may not do so for the first time in this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977).

At all events, the court's instructions, viewed as a whole, clearly indicated that the charges in the indictment were merely allegations, and that the government was required to prove those allegations by independent evidence (see Tr. 66, 128-139, 2216-2248). Moreover, both defense counsel and the prosecutor observed during their opening statements to the jury that the indictments were merely charges which the government had to establish beyond a reasonable doubt (Tr. 5-6, 8, 11, 140, 142, 144, 155, 157, 173-174, 2144).

Petitioner nonetheless claims (Pet. 19) that, from the following instruction, the jury might have inferred that the indictments were "documents" admitted into evidence (Tr. 137) (emphasis added by petitioner):

> Anything you have seen or have heard or may see or may hear outside this Courtroom is not evidence. The evidence will come from the witness stand and *any documents which may be admitted into evidence.* You are to consider only the evidence in this case, but in considering the evidence you're not limited to the bald statements of the witnesses. *You are not limited solely to what you see and hear a witness say or testify from the stand.*

However, petitioner neglects to quote the remainder of the instruction (*ibid.*):

> In other words, when you become an officer of this Court and take your oath, you don't leave your common sense at home. You're permitted to draw from facts that you find to have been proved such reasonable inferences that you find to be justified in light of your ordinary, everyday experiences.

In context, then, it is clear that the district court did not instruct the jury that they should consider the indictment as "evidence" in this case.

Finally, there is no merit to petitioner's claim that the prosecutor implied in closing argument that the indictment was evidence of guilt. It is clear from the text and context of the statement in question (Tr. 2146) that the prosecutor merely summarized the evidence presented at trial that related to the first marijuana transaction charged in the indictment.[8]

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[8]Petitioner also complains (Pet. 21-22) about the trial court's instruction on character evidence. The court instructed the jury as follows (Tr. 2246-2247):

> You will recall that [petitioner] introduced evidence tending to establish his good reputation for truth and v[e]racity and general character in the community. The evidence may indicate to you that it's improbable that a person of such good character would commit the crimes charged. However, such evidence does not preclude the Defendant from being so involved. You should consider this evidence along with all the other evidence in the case in determining the guilt or innocence of the Defendant for you are the sole and exclusive judges of the facts in the case and the weight and credibility to give all the evidence in the case.

These instructions adequately apprised the jury of the proper weight to be accorded character evidence.

Petitioner also urges (Pet. 22) that the trial court improperly instructed the jury in the following terms (Tr. 129): "[I]f there are two reasonable theories equally supported by the evidence; one consistent with guilt, the other consistent with innocence; you must adopt the theory consistent with innocence and acquit the Defendant, because he could not be said to be guilty beyond a reasonable doubt." However, it ill behooves petitioner now to object to this instruction, since he requested an instruction that for all practical purposes was indistinguishable. See Requested Jury Instruction No. 26 on Behalf of John Ruppel (IV:846).

Finally, petitioner complains (Pet. 22-23) that the court below failed to consider the timing of the district court's instructions summarizing petitioner's theory of defense. According to petitioner, by instructing the jury as to his theory of defense prior to instructing them on the

CONCLUSION

The Court should dispose of the petition as appropriate in light of its holding in *United States* v. *Goodwin*, No. 80-2195.

Respectfully submitted.

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conspiracy and possession counts, but after instructing them on the continuing criminal enterprise and racketeering counts, the district court improperly suggested that petitioner's theory was intended only as a defense to the latter two counts. The court of appeals, however, was never asked to consider this argument. Moreover, we are aware of no case, and petitioner cites none, which holds that a district court must give instructions in any particular order, particularly absent any request to do so by defense counsel. In any event, the court instructed the jury as to petitioner's theory of defense (Tr. 2223) only after it had summarized all the charges against him. Thus, the fact that the defense theory instructions preceded the court's detailed instructions as to the actual elements of the conspiracy and possession offenses is of no particular moment.

DOJ-1982-06